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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT

OF THE
STATE OF MONTANA,

FROM NOVEMBER 30, 1896, TO JUNE 7, 1897.

BY
FLETCHER MADDOX, } Reporters.
THOMAS C. BACH. }

VOLUME XIX.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1898.

Entered according to Act of Congress in the year 1898,
By BANCROFT-WHITNEY COMPANY,
In the Office of the Librarian of Congress, at Washington.

Rec. Apr. 14, 1898.



ANACONDA, MONT:
THE STANDARD PUBLISHING COMPANY,
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JUDGES

OF

The Supreme Court of the State of Montana,

DURING THE TIME OF THESE REPORTS.

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HON. WILLIAM H. DE WITT, ¹	}	Associate Justices.
HON. WILLIAM H. HUNT,		
HON. HORACE R. BUCK, ²		

OFFICERS OF THE COURT.

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BENJAMIN WEBSTER, CLERK.

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1. Term expired January 4, 1897.

2. Qualified January 4, 1897.



ATTORNEYS AND COUNSELORS AT LAW

ADMITTED FROM FEBRUARY 10, 1897, TO JANUARY 12, 1898.

ALLEY, RAYDON S.
CASEY, JOHN T.
COCKRIELL, EGBERT R.
CONRAD, BRYAN
DONLAN, MICHAEL C.
FORRESTELL, LEWIS P.
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GILCHRIST, M. P.
HALL, LORENZO D.
HALL, FORREST M.
HARRIS, JOHN F.
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HOFFMAN, EUGENE B.
JACKSON, WILLIAM A.

LE BLANC, M. E.
LILLARD, THOMAS J.
MACDONALD, EUGENE SPENCER
MCCELROY, HUGH C.
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NICHOLS, CHARLES WARREN
OLES, CHARLES E.
SUPPEGER, GEO. W.
SHULL, JOSIAH
TILLINGHAST, C. D.
WEDEKIND, ROBERT R.
WHEELER, EUSTACE

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TABLE OF CASES REPORTED.

Abbott, Sklower v.....	228
American Savings and Loan Association v. Burghardt.....	323
Ames & Frost Co. v. Heslet.....	188
Arnold v. Passavant.....	575
Bach, Cory & Co., Laubenheimer v.....	177
Barrett v. Shannon.....	397
Barry v. Western Assurance Co.....	571
Bechtel, Lynch, v.....	548
Beckstead v. Montana Union Ry. Co.....	147
Bernheim, State v.....	512
Big Blackfoot Milling Co. v. Blue Bird Mining Co.....	454
Billings Water Power Co., Sanderson v.....	236
Bismarck Bank, Gerry v.....	191
Black, General Electric Co. v.....	110
Blue Bird Mining Co., Big Blackfoot Milling Co. v.....	454
Bonner Co., Walterson v.....	554
Broadbent, State v.....	467
Brooks, Voight v.....	374
Brown, National Cash Register v.....	200
Burghardt, American Loan and Savings Association v.....	323
Butte & Boston Mining Co., Harrington v.....	411
Butte Butchering Co. v. Clarke.....	306
Butte Hardware Co., Mahoney v.....	377
Butte Lodge No. 14, O'Rourke v.....	541
Callantine, Morse v.....	87
Casey v. Thievleige.....	341
Catching, Whiteside v.....	394
Citizens' District, etc., Telegraph Co., Matusevitz v.....	368
City of Helena, Palmer v.....	61
Clarke, Butte Butchering Co., v.....	306
Clark v. Lindsay.....	1
Collier v. Fitzpatrick.....	562
Collins, McDonnell v.....	372
Conlon, Murray v.....	389
Conrow, State ex. rel Harmon v.....	104
Commissioners of Deer Lodge Co., State ex. rel. v.....	582
Commissioners of Granite Co., Morse v.....	450
Davis v. Morgan.....	141
Detroit & M. Cattle Co., Rumney Land and Cattle Co. v.....	557
Dickerman v. Gelsthorpe.....	249
Edwards, Sanford v.....	56
Elde, Priest v.....	58
Ellinghouse v. Taylor.....	462

First District Court, State ex. rel Seres v.....	501
Fitzpatrick, Collier v.....	562
Fransham, State ex. rel. Brooks v.....	273
Gagnon, Yellowstone National Bank v.....	402
Gawith, State v.....	48
Gelsthorpe, Dickerman v.....	249
General Electric Co. v. Black.....	110
Gerry v. The Bismarck Bank.....	191
Giddings v. Holter.....	263
Gilliam, Goodkind v.....	385
Giroux, State ex. rel. Giroux v.....	149
Glancy, Slona v.....	70
Gleim, Wood v.....	22
Goodkind v. Gilliam.....	385
Gorman, Jennings v.....	545
Gray, State v.....	236
Harrington v. Butte & Boston Mining Co.....	411
Harris, Wilson v.....	69
Hauser, Jurgens v.....	184
Hefferlin v. Krieger.....	123
Hershfield, Morrill v.....	245
Heslet, Ames & Frost Co. v.....	188
Holliday v. Sweet Grass Co.....	364
Holter, Giddings v.....	263
Holter v. Wassweiler.....	169
Huston v. Nuss.....	113
In re Liter's Estate.....	474
Jennings v. Gorman.....	545
Johnson v. Puritan Mining Co.....	30
Jurgens v. Hauser.....	184
Knight v. Le Beau.....	223
Kreiger, Hefferlin v.....	123
Lannen, McDonald v.....	78
Laubenheimer v. Bach, Cory & Co.....	177
Le Beau, Knight v.....	223
Lewis v. Lindley.....	422
Lewisohn Bros., Richards v.....	128
Lindley, Lewis v.....	422
Lindsay, Clark v.....	1
Liter's Estate, In re.....	474
Lynde v. Wakefield.....	23
Lynch v. Bechtel.....	548
McCabe, McIntire v.....	333
McCarthy v. O'Marr.....	215
McDonald v. Lannen.....	78
McDonnell v. Collins.....	372
McDougal, McKay v.....	488
McElwee v. McNaughton.....	474
McIntire v. McCabe.....	333
McKay v. McDougal.....	488

TABLE OF CASES REPORTED.

ix

McLaughlin, Stiff v.....	300
McNaughton, McElwee v.....	474
McPherson, National Wall Paper Co v.....	355
Mahoney v. Butte Hardware Co.....	377
Mathias v. White Sulphur Springs Asso.....	359
Matusevitz v. Citizens' District, etc. Telegraph Co.....	368
Maul v. Schultz.....	335
Mansfield, State v.....	483
Mayor of Great Falls, State ex. rel v.....	518
Millis, State ex rel, Pierson v.....	444
Merchants National Bank of Great Falls, Tuttle v.....	11
Merchants National Bank, Montana National Bank v.....	586
Metlin v. Shannon.....	401
Meyers v. Savery.....	329
Milz, Murray v.....	393
Montana Brewing Co., Pabst Brewing Co. v.....	294
Montana Central Ry. Co., Sweeney v.....	163
Montana Mining Co. v. St. Louis Mining and Milling Co.....	313
Montana National Bank v. Merchants National Bank.....	586
Montana Union Ry. Co., Beckstead v.....	147
Montana Union Ry Co., Mulligan v.....	135
Morgan, Davis v.....	141
Morris, Stebbins v.....	115
Morrill v. Hershfield.....	245
Morse v. Callantine.....	87
Morse, Commissioners of Granite Co. v.....	450
Mulligan v. Montana Union Ry. Co.....	135
Mulville v. Pacific Mutual L. Ins. Co.....	95
Murray v. Conlon.....	389
Murray v. Milz.....	393
National Cash Register Co. v. Brown.....	200
National Wall Paper Co. v. McPherson.....	355
Nuss, Huston v.....	113
O'Brien, State v.....	6
O'Marr, McCarthy v.....	215
O'Rourke v. Butte Lodge No. 14.....	541
Pabst Brewing Co. v. Montana Brewing Co.....	294
Pacific Mutual L. Ins. Co., Mulville v.....	95
Palmer v. City of Helena.....	61
Passavant, Arnold v.....	575
Patterson, Reardon v.....	231
Pincus v. Reynolds.....	564
Priest v. Eide.....	53
Puritan Mining Co., Johnson v.....	30
Reagan, Schilling v.....	508
Reardon v. Patterson.....	231
Reynolds, Pincus v.....	564
Reynolds, Willoughby v.....	421
Richards v. Lewisohn Bros.....	128
Rumney Land and Cattle Co. v. Detroit & M. Cattle Co.....	557

TABLE OF CASES REPORTED.

Sanderson v. Billings Water Power Co.....	236
Sanford v. Edwards.....	56
Savery, Meyers v.....	329
Schilling v. Reagan.....	508
Schultz, Maul v.....	335
Shannon, Barrett v.....	397
Shannon, Metlin v.....	401
Sklower v. Abbott.....	228
Sloan v. Glancy.....	70
State v. Bernheim.....	512
State v. Broadbent.....	467
State ex. rel Brooks v. Fransham.....	273
State v. Gray.....	206
State ex. rel. Great Falls Water Works, Mayor of Great Falls v.....	518
State v. Gawith.....	48
State ex rel Giroux v. Giroux.....	149
State, ex rel. Harmon v. Conrow.....	104
State ex rel Johnson v. Board of Coms. of Deer Lodge Co.....	582
State v. Mansfield.....	104
State v. O'Brien.....	6
State ex rel Pierson v. Millis.....	444
State ex rel Sere v. First District Court.....	501
State v. Wrote.....	209
State ex rel Young v. Yates.....	239
Stebbins v. Morris.....	115
Stiff v. McLaughlin.....	300
St. Louis Mining & Milling Co. v. Montana Mining Co.....	313
Sweeney v. Montana Central Ry Co.....	163
Sweet Grass County, Holliday v.....	364
Taylor, Ellinghouse v.....	462
Thielege, Casey v.....	341
Tuttle v. Merchants Nat. Bank of Great Falls.....	11
Voigt v. Brooks.....	374
Wakefield v. Lynde.....	23
Wassweiler, Holter v.....	169
Watterson v. E. L. Bonner Co.....	554
Western Assurance Co., Barry v.....	571
Whiteside v. Catching.....	394
White Sulphur Springs Asso. v. Mathias.....	359
Willoughby v. Reynolds.....	421
Wilson v. Harris.....	69
Wood v. Gleim.....	22
Wrote, State v.....	209
Yellowstone National Bank v. Gagnon.....	402
Yates, State ex rel. Young v.....	239

TABLE OF CASES CITED.

Ackerman v. Nell, 70 Ga. 728.....	50
Alexander v. Jacoby, 23 Oh. St. 358.....	320
Allen v. Glynn, Col. 29 Pac. 670.....	289
Alvora v. Hendrie, 94 U. S. 545.....	41
American Loan & S. Asso. v. Burghardt, 19 Mont. 333.....	544, 557
Amidon v. Benjamin, 128 Mass. 534.....	133
Appeal of Fidelity Ins. etc. Co., 108 Pa. St. 339.....	392
Arendt v. Mace, 76 Cal. 315.....	557
Armstrong v. Robinson, 5 Gill & J. 412.....	315
Arnett v. Russell, 59 Ga. 668.....	50
Arnold v. Dinsmore, 3 Col. 235.....	187
Arnold v. Sinclair, 12 Mont. 248.....	561
Attorney General v. Barbour, 121 Mass. 568.....	17
Ayer v. Spring, 10 Mass. 80.....	29
Bacon v. Frisbie, 80 N. Y. 394.....	146
Baker v. Irish, 172 Pa. St. 531.....	100
Baker v. M'Duffie, 23 Wend. 289.....	222
Baker v. Scott, 43 Pac. 76.....	229
Baker v. Snyder, 58 Cal. 617.....	448
Bancroft v. Sheehan, 21 Hun. 551.....	183
Bank v. Barnes, 18 Mont. 335.....	109
Bank v. Barnett, 27 La. Ann. 177.....	407
Bank v. Benham, 23 Ala. 143.....	222
Bank v. Boyce, 15 Mont. 175.....	447
Bank v. Henningway, 34 Oh. St. 381.....	409
Bank v. Kohner, 85 N. Y. 189.....	362
Bank v. Roberts, 9 Mont. 328.....	493
Barker v. Parker, 17 Mass. 564.....	29
Barkley v. Tieleke, 2 Mont. 59.....	83 86
Batesville Inst. v. Kaufman, 18 Wall. 151.....	18
Beal's Executor v. Storm, 26 N. J. Eq. 372.....	174
Beals v. Congregation B'nai, etc, 1 E. D. Smith, 654.....	131
Beebe v. U. S., 161 U. S. 104.....	47
Belk v. Meagher, 104 U. S. 284.....	496
Bennett v. Railway Co., 61 Io. 355.....	149
Berkshire v. Shultz, 25 Ind. 523.....	226
Bettle v. Wilson, 14 Ohio 257.....	120
Billings v. Sanderson, 8 Mont. 201.....	493
Bird v. Cotton, 57 Mo. 568.....	225
Black v. Appolonio, 1 Mont. 342.....	133
Blain v. Harrison, 11 Ill. 384.....	29
Blaker v. Cooper, 7 Serg. & R. 502.....	120
Blevins v. Smith, 16 S. W. 213.....	29
Bookwalter v. Conrad, 14 Mont. 61.....	560
Boone v. Chiles Pet. 211.....	122 443

Botsford v. O'Connor, 57 Ill. 73.....	60
Bouslog v. Garrett, 39 Ind. 338.....	376
Bowers v. Smith, Mo. 20 S. W. 101.....	289
Brangdon v. Navarre, Mich., 60 N. W. 277.....	289
Brady v. Shinkle, 40 Io. 578.....	584
Britton v. Lorenz, 45 N. Y. 51.....	146
Brooks v. Hyde, 37 Cal. 386.....	557
Brooks v. Railway Co. 101 U. S. 443.....	39
Brown v. Gatson, 1 Mont. 57.....	60
Browner v. Davis, 15 Cal. 9.....	320
Brownfield v. Bier, 15 Mont. 403.....	347 349
Brunell v. Cook, 13 Mont. 497.....	231
Bumagin v. Bradshaw, 39 Cal. 24.....	51
Burlington Water Co. v. Woodward, 49 Io. 59.....	535
Burns v. Follansbee, 20 Ill. App. 41.....	319
Burt v. Sheep Co., 10 Mont. 571.....	28
Butte, Anaconda & Pac. Ry. Co. v. Mont. U. Ry. Co., 16 Mont. 504.....	466
Callan v. Meacham, 23 How. 477.....	444
Campau v. Fairbanks, 1 Mich. 152.....	59
Campbell v. Rankin, 99 U. S. 261.....	496
Canada v. Southwick, 16 Pick. 556.....	219 222
Canal Co. v. Bright, 8 Colo. 144.....	518
Carrington v. Herrin, 4 Bush. 624.....	574
Carroll v. Wall, 35 Kan. 36.....	242
Carson v. Murray, 3 Paige 500.....	118
Carver v. Manufacturing Co., 2 Story 432.....	269
Caulkins v. Hellman, 47 N. Y. 452.....	4
Ceeder v. Lumber Co., 86 Mich. 541.....	362
Chace v. Trafford, 116 Mass. 529.....	375
Chase v. Curtis, 113 U. S. 452.....	269
Chase v. People, 2 Colo. 509.....	208
City of Chicago v. Union Building Asso., 102 Ill. 379.....	585
City of Helena v. Brule, 15 Mont. 429.....	130
City of East St. Louis v. O'Flynn, 119 Ill. 200.....	585
Clair v. Clair, 10 Neb. 54.....	376
Clark v. City of Providence, R. I., 15 Atl. 763.....	585
Clark v. Fosdick, 22 N. E. 1111.....	120
Cleverly v. Moseley, 148 Mass. 280.....	134
Coleman v. Ransom, 45 Ga. 316.....	50
Collier v. Lattimer, 35 Amer. Rp. 711.....	557
Collins v. Smith, 75 Wis. 395.....	47
Commonwealth v. Booker, 6 Dana 443.....	222
Commonwealth v. Henszey, 81 Pa. St. 101.....	282
Commonwealth v. Leech, 44 Pa. St. 32.....	284
Cone Ex. & Com. Co. v. Poole, 24 L. R. A. 289.....	226
Conklin v. Foster, 57 Ill. 104.....	556
Conrad v. Ewinger, 50 Io. 470.....	41
Cook v. Pendergrast, 61 Cal. 72.....	373
Coosaw Mining Co. v. Farmers' M. Co., 51 Fed. 107.....	332
County of Cass v. Johnston, 95 U. S. 310.....	244
Creek v. McManus, 13 Mont. 152.....	453
Creighton v. Hershfield, 2 Mont. 390.....	230
Cross v. Cross, 58 N. H. 373.....	122

TABLE OF CASES CITED.

xiii

Crowley v. Mining Co., 55 Cal. 273.....	362
Curran v. Clayton, 86 Me. 42.....	258
Curtis v. Curtis, 2 Brown Ch. C. 620.....	27
Dart v. Houston, 22 Ga. 506.....	282
Davenport v. Kleinschmidt, 6 Mont. 502.....	493, 495, 500
Davidson v. State, 34 N. E. 972.....	248
Davis v. Clark, 2 Mont. 394.....	492
Davis v. Wannamaker, 2 Colo. 637.....	319
Dayton v. Corser, 53 N. W. 717.....	29
Debolt v. Carter, 31 Ind. 355.....	226
Decker v. Armstrong, 87 Mo. 316.....	222
Dickerman v. Gelsthorpe, 19 Mont. 249.....	292
Ditch Company v. Henry, 15 Mont. 558.....	84, 88
Dower v. Richards, 151 U. S. 668.....	363
Draper v. U. S., 17 Supt. Ct. Rp. 107.....	302
Driscoll v. Dunwoody, 7 Mont. 394.....	175
Ducie v. Ford, 8 Mont. 223.....	493, 495, 500
Duncan v. Gilbert, 29 N. J. L. 521.....	408
Dunham v. Osborn, 1 Paige Ch. 634.....	29
Dyas v. Keaton, 3 Mont. 495.....	60
Dyer v. Dyer, 2 Cox Ch. 93.....	441
Edgerton v. Edgerton, 12 Mont. 122.....	47, 158
Ellsworth v. Chickasaw Co., 40 Io. 571.....	585
Emerson v. Eldorado Ditch Co., 18 Mont. 247.....	76, 106
Englebrecht v. Shade, 47 Cal. 627.....	557
Eureka Mining Co. v. Richmond M. Co., 4 Sawyer 302.....	363
Evans v. Davis, 3 B. Mon. 344.....	222
Fabian v. Collins, 3 Mont. 215.....	76
Fallbrook Irrigation D. v. Bradley, 164 U. S. 112.....	466
Farmers' State Bank v. Blevins, 46 Kan. 536.....	409
Farni v. Tesson, 1 Black 309.....	316, 317
Fensler v. Prather, 43 Ind. 119.....	203
Fisher v. Fisher, 98 Mass. 303.....	407
Fisher v. Minot, 10 Gray 260.....	4
Flickinger v. Shaw, 87 Cal. 126.....	76
Focke v. Blum, 82 Tex. 436.....	589
Foote v. Foote, 58 Barb. 262.....	440
Foster v. Wilson, 5 Mont. 53.....	130
Fowler v. Frisbie, 37 Cal. 34.....	320, 321
Francis v. Cox, 33 Cal. 223.....	310
Frazier v. Syas, 4 N. W. 934, 35 Amer. Rep. 466.....	557
French v. Pearce, 8 Conn. 439.....	548
Froman v. Patterson, 10 Mont. 107.....	51
Fuller v. Holden, 4 Mass. 498.....	222
Fulton Ins. Co. v. Baldwin, 37 N. Y. 648.....	223
Gage v. Maryatt, 9 Mont. 265.....	511
Gale v. Mensing, 20 Mo. 461.....	17
Gallup v. Robinson, 11 Gray 20.....	219
Galvin v. Palmer, Cal. 49 Pac. 172.....	248
Gans v. Switzer, 9 Mont. 406.....	190
Garbut v. Bowling, 81 Mo. 214.....	120
Garfield M. & M. Co. v. Hammer, 6 Mont. 54.....	498

Garner v. Bank, 151 U. S. 420.....	175
Gay v. Moss, 34 Cal. 125.....	234
Gaylord v. Place, 98 Cal. 472.....	556
Getchell v. Allen, 34 Io. 559.....	41
Gillespie v. Dion, 18 Mont. 183.....	284
Gleason v. Spray, 81 Cal. 217.....	327
Goodwell v. Railway Co., 18 Mont. 293.....	139
Goodwin v. State, 96 Ind. 550.....	248
Gorsuch, Trustee v. Briscoe, 56 Md. 573.....	18
Governor v. Gibson, 14 Ala. 326.....	219
Gracier v. Weir, 45 Cal. 54.....	310
Grand Opera House v. Maguire, 14 Mont. 558.....	40
Grand Tower v. Schirmer, 64 Ill. 116.....	59
Granite Mountain M. Co. v. Weinstein, 7 Mont. 346.....	447
Grant v. City of Davenport, 36 Io. 401.....	535
Greeley v. Scott, 2 Woods 657.....	556
Green v. Easton, 26 N. Y. Supp. 553.....	270
Grube v. Wells, 34 Io. 148.....	548
Halleck v. Mixer, 16 Cal. 574.....	225
Hamilton v. People, 29 Mich. 177.....	496
Hamilton v. Railway Co., 17 Mont. 334.....	138, 651
Hancock v. Ins. Co., 114 Mass. 155.....	230
Harmon v. Cattle Co., 9 Mont. 243.....	227
Harper v. Archer, 28 Miss. 212.....	27
Harris v. Kirkpatrick, 35 N. J. L. 392.....	222
Harrison v. Eldridge, 7 N. J. L. 498.....	29
Hart v. Gray, 3 Sumn. 339.....	59
Hastings v. Railway Co., 18 Mont. 493.....	139
Hauswirth v. Butcher, 4 Mont. 309.....	381
Hays v. Mercier, 22 Neb. 656.....	131
Heinrich v. Englund, 34 Minn. 395.....	375
Herbst Imp. Co. v. Hogan, 16 Mont. 384.....	225
Hershy v. Latham, 46 Ark. 542.....	175
Hibbard v. Tomlinson, 2 Mont. 220.....	419
Higley v. Gilmer, 3 Mont. 90.....	100
Hindman v. Rizer, 27 Pac. 13.....	85
Hitchings v. Morrison, 72 Me. 331.....	548
Hopkins v. Chandler, 17 N. J. L. 299.....	221
Hopkins v. City of Butte, 16 Mont. 103.....	400
Hopkins v. Noyes, 4 Mont. 550.....	498
Hotchkiss v. Marlon, 12 Mont. 218.....	64
House v. Towle, 29 Pac. 890.....	29
Howell v. State, 71 Ga. 224.....	518
Huff v. Wagner, 63 Barb. 215.....	407
Illinois Trust & Sav. Bank v. Arkansas City, 76 Fed. 271.....	533
Insurance Co. v. Cushman, 108 U. S. 51.....	186
Insurance Co. v. Raymond, 70 Mich. 485.....	518
In re Eastern R. R. Co. 120 Mass 412.....	18
In re Lee Tong, 9 Sawy. 333, 18 Fed. 253.....	208
In re Tempest, Vol. 1 E. L. R. Ch. App. cases 485.....	19
Iron Silver Min. Co. v. M. & S. Min. Co., 143 U. S. 394.....	347
Iron Silver Mining Co. v. Reynolds, 124 U. S. 394.....	347

TABLE OF CASES CITED.

xv

James v. Fellowes, 20 La. Ann. 116.....	376
Jaques v. Hult, 15 N. J. L. 38.....	375
Jeffries v. Ins. Co. 110 U. S. 305.....	101
Jensen v. Barbour, 15 Mont. 582.....	453
Johnson v. Emerick, 70 Mich. 215.....	204
Johnson v. Mining Co., 16 Mont. 164.....	139
Johnson v. Vance, 86 Cal. 128.....	496
Judah v. Fredericks, 57 Cal. 389.....	226
Kane v. People, 4 Neb. 509.....	232
Kelly v. Laws, 109 Mass. 395.....	133
Kenley v. Hudelson, 39 Amer. Rep. 31.....	557
Kennon v. King, 2 Mont. 437.....	209
Kilborn v. Field, 73 Pa. St. 194.....	122
Kilgour v. Crawford, 51 Ill. 249.....	392
Kings' Co. Ins. Co. v. Stevens, 101 N. Y. 411.....	585
Kleinschmidt v. McDermott, 12 Mont. 315.....	228
Lally v. Wise, 28 Cal. 540.....	320
Lambrecht v. Patten, 15 Mont. 280.....	175
Laubenheimer v. Bach, Cory & Co., 19 Mont. 177.....	234
Launtz v. People, 113 Ill. 144.....	243
Lay v. Parsons, Cal. 38 Pac. 447.....	258
Ledon v. Havermeier, 8 L. R. A. 245.....	4
Lee Tong, in re, 9 Sawy. 333. 13 Fed. 263.....	208
Legard v. Johnson, 3 Ves. Jr. 353.....	119
Leonis v. Lazzarovich, 55 Cal. 55.....	326
Litchfield v. Ashford, 30 N. W. 649.....	187
Livingston v. Kettelle, 41 Amer. Dec. 170.....	326
Loker v. Damon, 17 Pick. 284.....	169
Loomis v. Brown, 16 Barb. 330.....	318
Lorenz v. Jacob, 63 Cal. 73.....	464
Lumber Co. v. Newkirk, 80 Cal. 275.....	133
Lummis v. Kasson, 43 Barb. 373.....	219, 222
Lyons-Thomas H'ware Co. v. Perry M'fg Co. 22 L. R. A. 802.....	189
McCauley v. Gilmer, 2 Mont. 202.....	492
McClanahan v. Porter, 10 Mo. 746.....	29
McCoy v. Crawford, 9 Tex. 353.....	59
McFarland v. Cotter, 1 Mont. 383.....	376
McKay v. Mont. U. R. R. Co., 13 Mont. 15.....	50, 453
McKenzie v. L'Amoreaux, 11 Barb. 516.....	319
McKinstry v. Clark, 4 Mont. 390.....	496
McLaughlin v. McLaughlin, 20 N. J. Eq. 190.....	27
McLeod v. Scott, 33 Ark. 72.....	320
McLeran v. Benton, 43 Cal. 467.....	326
McMahon v. Webb, 52 Miss. 424.....	320
McMillan v. Hayward, 94 Cal. 357.....	396
McFee v. Litchfield, 145 Mass. 565.....	132
Mackey v. Auer, 8 Hun. 180.....	371
Magruder v. Smith, 79 Ky. 512.....	27
Maitland v. Bank, 40 Md. 540.....	408
Marshall v. Livingston Nat. Bank, 11 Mont. 351.....	17
Martin v. Miles, 46 Neb. 772.....	256
Mattingly v. Lewisohn, 8 Mont. 259.....	499

Mattison v. Smith, 37 Wis. 333.....	59
Mauldin v. Ball, 5 Mont. 96.....	358, 493
Mayers v. Carothers, 14 Mont. 274.....	453
Mendocino Co. v. Lamar, 30 Cal. 623.....	311
Mercer v. Vose, 67 N. Y. 56.....	343
Merchants' Bank v. Thompson, 55 N. Y. 7.....	29
Metcalf v. McCutchen, 60 Miss. 145.....	543
Meyendorf v. Frohner, 3 Mont. 323.....	494
Meyers v. Block, 120 U. S. 206.....	322
Migeon v. Railway Co., 77 Fed. 256.....	346
Mill Dam Foundry v. Hovey, 21 Pick. 455.....	399
Miller v. Luco, 80 Cal. 257.....	236
Miller v. Pennoyer, 31 Pac. 330.....	389
Miller v. Plue, 64 N. W. 232.....	60
Milligan v. Savery, 6 Mont. 129.....	290, 500
Missoula Elec. Light Co. v. Morgan, 13 Mont. 394.....	238
Montana L. & M. Co. v. Mining Co., 15 Mont. 24.....	40
Montana National Bank v. Schmidt, 6 Mont. 610.....	326
Moors v. Sanford, 41 Pac. 1064.....	339
Mora v. Le Roy, 58 Cal. 8.....	236
Moreland's Assignee v. Bank, 30 S. W. 637.....	127
Morse v. Gibbons, 43 Cal. 377.....	187
Moulton v. Holmes, 57 Cal. 337.....	101
Murray v. Heinze, 17 Mont. 353.....	12
Murray v. Swanson, 18 Mont. 533.....	40
Nance v. Hooper, 11 Ala. 552.....	19
Neil v. Thorn, 88 N. Y. 270.....	417
Nelson v. City of Helena, 16 Mont. 21.....	109
Nelson v. Donovan, 16 Mont. 35.....	322
Newell v. Meyendorf, 9 Mont. 254.....	341
Newell v. Nicholson, 17 Mont. 339.....	341
Newlove v. Woodward, 9 Neb. 502.....	59
Nickerson v. Meacham, 14 Fed. 381.....	440, 444
Nichols v. Lantz, 47 Pac. 70.....	35
N. P. R. R. Co. v. Bender, 13 Mont. 432.....	47
Northfield Knife Co. v. Sharpleigh, 39 N. W. 783.....	539
North Star B. & S. Co. v. Ladd, 20 N. W. 334.....	590
Noyes v. Black, 4 Mont. 527.....	497
O'Brien v. Ins. Co., 56 N. Y. 52.....	599
Orr v. Haskell, 2 Mont. 350.....	447
Oury v. Goodwin, 26 Pac. 376.....	496
Oviatt v. Hughes, 41 Barb. 541.....	270
Paige v. Carroll, 61 Cal. 215.....	373
Parker v. Orr, 41 N. E. 1002.....	259
Parvin v. Wimberg, 30 N. E. 790.....	368
Patterson v. Ely, 19 Cal. 23.....	44
Paul's Exs. v. Paul, 36 Pa. St. 270.....	27
Payne v. Treadwell, 16 Cal. 221.....	492, 509
Pearce v. Hitchcock, 2 N. Y. 333.....	317
Peery v. Wright, 45 Pac. 46.....	137
People v. Bennett, 32 N. E. 1044.....	214
People v. Carroll, 30 Cal. 153.....	209

TABLE OF CASES CITED.

xvii

People v. Every, 38 Mich. 405.....	283
People v. Hall, 90 N. Y. 117.....	284
People v. Harshaw, 60 Mich. 200.....	241
People v. Higgins, 10 Wend. 465.....	214
People v. Hill, 78 Cal. 405.....	50
People v. Holden, 28 Cal. 124.....	283
People v. Kinsey, 51 Cal. 273.....	8
People v. Londoner, 22 Pac. 764.....	281
People v. Norton, 9 N. Y. 178.....	18
People v. Ridgley, 21 Ill. 68.....	233
People v. Sam Lung, 70 Cal. 515.....	208
People v. Supervisors of Otsego Co., 51 N. Y. 401.....	540
People v. Turnpike Co., 2 John. 190.....	282
People v. Whitcomb, 55 Ill. 172.....	232
People v. Wood, 42 N. E. 536.....	257, 289
Peters v. Grubb, 21 Pa. St. 455.....	267
Plaster v. Wade, 69 Cal. 136.....	382
Phillips v. Goldtree, 74 Cal. 151.....	236
Phillips v. Manufacturing Co. 88 Ill. 305.....	319
Phillips v. Thorpe, 10 Oreg. 494.....	122
Phoenix Bank v. Donnell, 40 N. Y. 410.....	235
Pinney v. Hershfeld, 1 Mont. 367.....	322
Pollitt v. Kerr, 49 N. J. Eq. 65.....	26
Price v. Hobbs, 47 Md. 359.....	27
Price v. Lush, 10 Mont. 61.....	289
Quigley v. Birdseye, 11 Mont. 439.....	84
Quivey v. Hall, 19 Cal. 98.....	395
Rader v. Nottingham, 2 Mont. 157.....	447, 449
Randall v. Packard, 142 N. Y. 47.....	247
Randall v. Randall, 37 Mich. 563.....	120
Railroad Co. v. Anderson, 77 Cal. 297.....	447
Railroad Co. v. Compton, 75 Tex. 667.....	248
Railroad Co. v. National Bank, 102 U. S. 14.....	404
Railway Co. v. Beckwith, 129 U. S. 26.....	149
Railway Co. v. Tabor, 32 S. W. 168.....	248
Rains v. Wheeler, 76 Tex. 390.....	120
Rawson v. Taylor, 30 Oh. St. 389.....	203, 206
Raymond v. Thexton, 7 Mont. 229.....	138, 310
Reagan v. Hadley, 57 Ind. 509.....	440
Reed v. Fletcher, 39 N. W. 487.....	589
Renshaw v. Switzer, 6 Mont. 464.....	498
Republic of Honduras v. Soto, 112 N. Y. 310.....	267
Resser v. Carney, 54 N. W. 89.....	267
Ricker v. Hibbard, 73 Me. 105.....	548
Robbins v. Clements, 41 Oh. St. 235.....	59
Robinson v. Hurley, 11 Io. 410.....	230
Roraback v. Pennsylvania Co., 20 Atl. 465.....	248
Rosenstein v. Coleman, 18 Mont. 469.....	422
Rossiter v. Loeber, 18 Mont. 372.....	416
Rouse v. Bank, 46 Oh. St. 389.....	203, 206
Russell v. Farley, 106 U. S. 433.....	322
Rushville Gas Co. v. City of Rushville, 23 N. E. 72.....	244
Ryan v. Maxey, 15 Mont. 100.....	447

Sawyer v. Robinson, 11 Mont. 416.....	60
Schmertz v. Dwyer, 53 Pa. 335.....	4
Schmieding v. Doellner, 10 Mo. App. 373.....	122
Settlemeier v. Sullivan, 97 U. S. 444.....	60
Sharvey v. Iron Mining Co., 58 N. W. 884.....	186
Shotwell v. Hamblin, 23 Miss. 157.....	222
Shriver v. Lovejoy, 32 Cal. 575.....	204
Siebs v. Machine Works, 86 Cal. 390.....	363
Smelting Co. v. Kemp, 104 U. S. 636.....	353, 456
Smith v. Bridge Co., 13 Ill. App. 572.....	589
Smith v. Freyler, 4 Mont. 489.....	127, 204
Smith v. Hope Mining Co., 18 Mont. 482.....	77
Smith v. Mining Co., 12 Mont. 524.....	123, 458
Smith v. O'Hara, 43 Cal. 373.....	86
Smith v. Rothchild, 4 O. Cir. Rep. 544.....	29
Smith v. Sherman Mining Co., 12 Mont. 524.....	41
Smith v. Smith, 62 Ill. 493.....	262
Snead v. Tietjen, 24 Pac. 324.....	50
Snowball v. People, 147 Ill. 230.....	283
Somers v. Somers, 81 Cal. 608.....	448, 560
Souter v. Maguire, 78 Cal. 543.....	496
Soyer v. Water Co., 15 Mont. 1.....	453
Sparks v. Transfer Co., 104 Mo. 531.....	362
Speck v. Dousman, 7 Mo. App. 165.....	122
Spencer v. Gelssman, 37 Cal. 96.....	555
Spreckles v. Spreckles, 45 Pac. 1022.....	94
St. John v. St. John, 11 Ves. Jr. 526.....	119
Stackpole v. Hallahan, 16 Mont. 40.....	255, 289
Stanley v. Schwalby, 147 U. S. 517.....	267
State v. Adams, 65 Ind. 393.....	281
State, to use of, v. Benoit, 37 Mo. 500.....	17
State v. Biesman, 12 Mont. 11.....	322
State v. Black, 15 Mont. 144.....	51, 238
State v. Camp Sing, 18 Mont. 28.....	68
State, ex rel, v. Dickerman, 16 Mont. 278.....	453
State, ex rel, v. District Court, 13 Mont. 370.....	504
State, ex rel, v. Fransham, 19 Mont. 273.....	474
State v. Frazier, 44 N. W. 471.....	281
State v. Gallagher, 81 Ind. 558.....	284
State, ex. rel. v. Gelsthorpe, 19 Mont. 249.....	292
State v. Gray, 22 Neb. 365.....	242
State v. Green, 37 Oh. St. 227.....	244
State v. Hinchey, 5 Wash. 326.....	50
State, ex. rel. v. Marlow, 15 Oh. St. 114.....	283, 284
State v. Matson, 38 Mo. 489.....	226, 227
State v. Meilike, 51 N. W. 875.....	284
State v. Millis, 19 Mont. 444.....	560, 561
State v. Mitchell, 17 Mont. 67.....	68
State v. O'Brien, 18 Mont. 1.....	6
State v. Pollard, 83 N. C. 598.....	9
State v. Reek, 18 Mont. 557.....	285
State, ex. rel. v. Rotwitt, 15 Mont. 29.....	68
State, ex. rel. v. Rotwitt, 18 Mont. 502.....	285
State v. Russell, 34 Neb. 116.....	256, 259

TABLE OF CASES CITED.

xix

State v. Stunkle, 41 Kan. 456.....	518
State, ex. rel. v. Taylor, 15 Oh. St. 137.....	282
State, ex. rel. v. Tooker, 15 Mont. 8.....	68
State, ex. rel. v. Tooker, 18 Mont. 540.....	286
State, ex. rel. v. Wadkins, 1 Rich. Law 42.....	283
Steam Heating Co. v. Wells, 16 Mont. 65.....	458
Stearns v. Fields, 90 N. Y. 640.....	248
Stebbins v. Morris, 19 Mont. 115.....	158, 159
Steere v. Benson, 2 Ill. App. 560.....	409
Stevens v. Ellsworth, 63 N. W. 633.....	247
Stoddard v. Kimball, 6 Cush. 469.....	406
Storey v. Storey, 125 Ill. 608.....	123
Sullivan v. Mining Co., 143 U. S. 431.....	347
Summers v. Faresh, 10 Cal. 347.....	320, 321
Summers v. Rabb, 13 Ill. 483.....	29
Sweetland v. Olson, 11 Mont. 27.....	76
Swift v. Tyson, 16 Pet. 1.....	404
Swire v. Redman, 1 Q. B. Div. 536.....	206
Sykes v. Chadwick, 18 Wall. 141.....	174
Talcott v. Philbrick, 20 Atl. 431.....	267
Taylor v. Bleakey, 39 Pac. 1045.....	268
Taylor v. Fowler, 18 Oh. St. 567.....	29
The Norton, 4 Biss. 188.....	527
Thamling v. Duffey, 14 Mont. 567.....	416
Thomas v. Hillhouse, 17 Io. 71.....	108
Thompson v. Lumber Co., 30 Pac. 741.....	189
Thornton v. Hook, 36 Cal. 223.....	417
Tibbits v. Ah Tong, 4 Mont. 536.....	498
Torbett v. Goodwin, 17 N. Y. Supp. 46.....	272
Tracy v. Harmon, 17 Mont. 465.....	130
Traders' Bank v. Boken, 5 Wash. 771.....	44
Truscott, v. Cattle Co., 73 Fed. 60.....	303
Tucker v. Jones, 8 Mont. 225.....	76, 84
Tudor v. Du Long, 18 Mont. 499.....	358
Turquard v. Knight, 2 Mees. & W. 98.....	146
Tuttle v. Bank, 19 Mont. 11.....	108
U. S. v. Ballin, 144 U. S. 1.....	243
U. S. v. Iron Silver Mining Co., 128 U. S. 674.....	347
U. S. v. McBratney, 104 U. S. 621.....	302
U. S. v. Mayo, 26 Fed. cases 1231.....	615
U. S. v. Norton, 91 U. S. 566.....	617
U. S. v. Partello, 48 Fed. 670.....	303
Valette v. Mason, 1 Smith, Ind. 89.....	406
Vanbebber v. Plunkett, 38 Pac. 707.....	375
Van Hoffman v. City of Quincy, 4 Wall. 535.....	637
Victory, etc., Co. v. Beecher, 26 Hun. 48.....	270, 271
Vinson v. Gentry, 21 S. W. 578.....	29
Wait v. Association, 23 Atl. 77.....	363
Walbrunn v. Baljen, 68 Mo. 164.....	548
Walker v. Walker, 9 Wall. 750.....	119
Wall v. Railway Co., 12 Mont. 44.....	100

Wallace v. Owsley, 11 Mont. 219.....	373
Wallis v. Dilley, 7 Md. 237.....	315
Walsh v. Hutchings, 60 Cal. 223.....	448
Walsh v. Mueller, 18 Mont. 180.....	393
Warner v. Cammack, 37 Io. 642.....	399
Washburn v. People, 10 Mich. 372.....	498
Watkins v. Degener, 63 Cal. 500.....	373
Watkins v. Ford, 69 Mich. 357.....	375
Watkins v. Morris, 14 Mont. 354.....	94
Watson v. O'Neil, 14 Mont. 197.....	54
Weaver v. English, 11 Mont. 84.....	237
Weber v. Rothchild, 15 Oreg. 355.....	442
Wellington v. Gale, 13 Mass.....	453
Wells v. Stout, 9 Cal. 490.....	170
Westmeath v. Westmeath, Jac. 128.....	119
White v. White, 88 Cal. 429.....	448
Whitney Arms Co. v. Barlow, 68 N. Y. 34.....	370
Whittam v. Zahorick, 59 N. W. 57.....	390
Williams v. Fitch, 13 N. Y. 551.....	146
Williams v. Smith, 2 Hill 301.....	406
Wilson Sewing Machine v. Boyington, 73 Ill. 534.....	363
Wolf v. New Orleans, 103 U. S. 358.....	537
Wood v. Strathers, 76 Cal. 545.....	540
Wolverton v. Nichols, 5 Mont. 89.....	230
Wren v. State, 70 Ala. 1.....	308
Yellowstone Nat. Bk. v. Gagnon, 19 Mont. 402.....	441
Yore v. Murphy, 10 Mont. 304.....	373
Young v. Capen, 7 Mich. 287.....	59
Young v. Simpson, 42 Pac. 656.....	280
Youngs v. Lee, 18 Barb. 187.....	497
Zimmer v. Miller, 64 Md. 296.....	444

STATUTES CONSTRUED.

LAWS OF 1889.

Hunt—Anti-Gambling.....	206
-------------------------	-----

LAWS OF 1891.

Fence Law.....	147
----------------	-----

COMPILED STATUTES 1887.

FIRST DIVISION (CODE OF CIVIL PROCEDURE.)

Sec. 41.....	394
Sec. 81.....	45
Sec. 307.....	228
Sec. 312.....	47
Sec. 323.....	323
Sec. 349.....	47
Sec. 744.....	56

FOURTH DIVISION (CRIMINAL PRACTICE) 1887.

Sec. 256.....	209
Sec. 258.....	259

FIFTH DIVISION—GENERAL LAWS (1887).

Sec. 226.....	104
Sec. 345.....	518
Sec. 346.....	239
Sec. 385.....	239
Sec. 415.....	518
Sec. 469.....	265
Sec. 463.....	265
Sec. 493.....	191
Sec. 1237.....	54
Sec. 1270 to 1383 (Mechanics' Liens).....	30, 123

CODES OF 1895.

POLITICAL CODE.

Sec. 603.....	501
Sec. 1261 to 1403 (Election Laws).....	249, 273
Sec. 2722.....	297

Sec. 4533.....	95
Sec. 4634.....	124
Sec. 4800.....	61

CIVIL CODE.

Sec. 215-216.....	115
Sec. 978 to 984 (R. R. Ticket Agents).....	513

CODE OF CIVIL PROCEDURE.

Sec. 534.....	313
Sec. 613.....	372
Sec. 680.....	223
Sec. 745.....	223
Sec. 1294.....	339
Sec. 1739.....	447, 558
Sec. 2737.....	95
Sec. 3163.....	141
Sec. 3266.....	474
Sec. 3320 and others, on Evidence (Chap. III.).....	474

PENAL CODE.

Sec. 401.....	467
Sec. 1900.....	6
Sec. 2143.....	6
Sec. 2191.....	6
Sec. 2192.....	45
Sec. 2194.....	45

CASES DETERMINED

IN THE

SUPREME COURT

AT THE

OCTOBER TERM, 1896.

PRESENT:

HON. WILLIAM Y. PEMBERTON, Chief Justice,
HON. WILLIAM H. DE WITT, } Associate Justices.
HON. WILLIAM H. HUNT, }

CLARK, ASSIGNEE, RESPONDENT, v. LINDSAY & COMPANY, (LIMITED), APPELLANT.

[Submitted November 18, 1896. Decided November 30, 1896.]

SALES OF PERSONALTY—Delivery—Shipment.—A contract for the sale of merchandise which requires the vendor to ship the goods free on board the cars, on or before a certain date, is complied with by the vendor when he places the goods on board the car at the designated point on that date and there is no implied obligation on his part to see that the carrier moves the car forward toward its destination before the expiration of the day named.

Appeal from First Judicial District, Lewis and Clarke County.

ACTION on contract. The cause was tried before BUCK, J. Plaintiff had judgment below. Affirmed.

Statement of the case by the justice delivering the opinion.

This action is brought to recover damages sustained by plaintiff's assignor, one Pendleton, because of the failure of Lindsay & Co. to receive a car load of eggs and dressed poultry sold by Pendleton to the defendant in February, 1892. It is alleged by plaintiff that on February 11th, 1892, Pendleton sold and furnished to defendant 370 cases of eggs at the agreed price of twenty cents per dozen, amounting in all to \$2,220; that the said agreed price was for the eggs delivered on board the cars in Lawrence, Kansas; that thereafter on February 13th, 1892, in addition to the eggs sold, Pendleton sold and furnished to defendant a quantity of dressed turkeys of the value, when delivered on board the cars at Lawrence, of \$142.04; that defendant requested that the poultry be shipped in the same car with the eggs, and that under the contract the eggs and poultry were to be shipped on or before February 15th, 1892; that defendant was to pay the freight from Lawrence, Kansas, to its place of business in Helena, and plaintiff's assignor was instructed by the defendant to ship via the Union Pacific Railway; that according to the contract and direction of the defendant, Pendleton shipped the eggs and poultry on February 15th, 1892, as directed and notified the defendant of the shipment on said date; that on the arrival of the eggs and poultry at Helena about February 23d, 1892, the defendant refused to unload them from the cars or pay for the same, or to have anything to do with the goods; that plaintiff was obliged to sell the same for the best prices he could get and thereby sustained loss.

The defendant denied the contract as alleged by plaintiff, and for further answer averred that about February 11th, 1892, Pendleton and defendant entered into an agreement whereby Pendleton was to sell to defendant the eggs and poultry mentioned in the complaint, and at prices therein

given; that by the terms of their contract it was expressly agreed that Pendleton should deliver the eggs and poultry free on board the cars on the Union Pacific Railway at Lawrence, Kansas, in such time that the same could be shipped and leave Lawrence on or before February 15th, and that the time of shipment and departure of the eggs and poultry was a material part of the contract; but that Pendleton failed to load the merchandise on board the cars at Lawrence in time to permit the same to be shipped and depart from Lawrence on or before February 15th, 1892, and that the said merchandise could not be shipped and depart from Lawrence before February 16th, and did not in fact leave until February 17th.

The plaintiff by replication denied that Pendleton failed to put the merchandise on board the cars at Lawrence so that the same could be shipped and depart therefrom on or before February 15th, 1892, and alleged that it was loaded at Lawrence in time so that it could have been shipped and have departed from Lawrence on February 15th, 1892 and alleged that the merchandise left Lawrence on February 16th, 1892.

The replication also denied that it was any part of the contract that Pendleton should cause the merchandise to depart from Lawrence on or before February 15th, 1892.

The case was tried to a jury and a verdict returned in favor of plaintiff, assessing his damages in the sum of \$676.66. Judgment was entered on the verdict. Defendant moved for a new trial, which was denied. From the judgment and the order overruling the motion of a new trial the defendant appeals.

Henry C. Smith, for Appellant.

Smith & Word, for Respondent.

HUNT, J.—What was the contract entered into between the parties? If the respondent is correct, Pendleton did all he was obliged to do, when on February 15th, he placed the merchandise involved in good condition on board the railroad cars at Lawrence, Kansas, to be transported to Helena, Montana.

But if appellant, defendant, is correct, although it admits that the contract entered into between it and Pendleton is the same as set forth by Pendleton, it nevertheless avers it was agreed in and by said contract that the merchandise was to be delivered to the railroad company so that it could be shipped and leave Lawrence on or before February 15th, and that such shipment and departure were material parts of the contract.

Without reviewing the evidence, it is sufficient to say that the plaintiff's version of the agreement is fully supported. When plaintiff's assignor agreed to ship the goods on or before February 15th, presumably he meant only to deliver the goods on that date to the carrier for transportation on a regular line of transportation between the point of shipment and destination. This was done.

The signification of the word "shipment" is uniform. The Century Dictionary defines "shipment" as "the act of dispatching or shipping; especially the putting of goods or passengers on board ship for transportation by water. A quantity of goods delivered at one time for transportation whether by sea or by land." (Black's Law Dictionary.)

There was, therefore, no implied obligation on the part of the plaintiff's assignor to see that the merchandise left on the 15th. The argument of the appellant is very close to that advanced by defendants in the case of *Ledon v. Havemeyer*, 8 L. R. A. 245. It was there contended that the word "shipment" meant a clearance of the vessel as well as putting the goods on board within the period allowed for shipment. But the court held otherwise, saying :

"The words 'shipment' and 'shipped' are now used indifferently to express the idea of goods delivered to carriers for the purpose of being transported from one place to another, over land as well as water, and imply with respect to carrying by land, a completed act, irrespective of the time or mode of transportation. (*Caulkins v. Hellman*, 47 N. Y. 452; *Fisher v. Minot*, 10 Gray 260; *Schmertz v. Dwyer*, 53 Pa. 335.)

* * * * *

“We have been referred to no authorities supporting the defendants’ contention, and we believe it to be contrary to the invariable meaning of the word, as defined by lexicographers, as understood by the mercantile community generally or as laid down in the decision of the courts.”

The court charged the jury in harmony with the law as above stated, and submitted to their determination all the evidence bearing upon the actual agreement between the parties. They were told that if they believed that the contract was in effect that the goods were to be shipped by Pendleton on or before February 15th, and that Pendleton placed the goods on board the cars of the Union Pacific Railway Company at Lawrence on the said 15th day of February, then they should find that Pendleton had complied with his part of the contract; but if they believed that the agreement was that Pendleton was to deliver the goods so that they could leave Lawrence on the 15th, and they were not delivered in time to let the cars go forward on that date, they should find for the defendant. They were further told that if, however, they believed Pendleton placed the goods on board the cars on the 15th so that they could have left Lawrence on that day, then Pendleton complied with his contract and the plaintiff could recover. Thus the facts and the law applicable were fairly submitted to the jury and their verdict for the plaintiff cannot now be disturbed.

We may say, too, that the appellant in the case is in no position to complain, for under the construction of the contract that it contends for, it could not recover, inasmuch as it clearly appears by the testimony that the car was loaded on the night of the 15th at Lawrence, in time to have enabled the carrier to move it forward toward its destination—hence if there was any negligence at all, it was on the part of the railroad company, and did not lie in a breach of plaintiff’s contract with defendant. (Hutchinson on Carriers, § 89.)

There being no error in the record, the judgment and order will be affirmed.

Affirmed.

PEMBERTON, C. J., concurs. DE WITT, J., not sitting.

STATE, APPELLANT, v. O'BRIEN, RESPONDENT.

[Submitted November 10, 1896. Decided November 30, 1896.]

CRIMINAL PRACTICE—Appealable order—Former acquittal and jeopardy.—An order of the district court sustaining a defendant's pleas of formal acquittal and jeopardy, after the reversal of a conviction for manslaughter under an indictment charging murder in the first degree, is not an appealable order under subdivision 4 of section 2278 of the Penal Code, providing that an appeal may be taken by the state "from an order made after judgment, affecting the substantial rights of the state," since the defendant, after his conviction was set aside by the appellate court, stood before the court in the same position as if no judgment had been rendered against him.

SAME—Former acquittal and jeopardy—Jury trial.—The pleas of former acquittal and once in jeopardy involve issues of fact under section 1990 of the Penal Code and therefore cannot be determined without a finding by a jury.

Appeal from Eighth Judicial District, Cascade County.

INFORMATION for murder in the first degree. The defendant's pleas of former acquittal and former jeopardy were sustained by BENTON, J. Appeal dismissed.

Henri J. Haskell, Attorney General, for the State, Appellant.

Leslie & Downing, for Respondent.

HUNT, J.—The defendant was originally tried before the district court of Cascade county under an information charging him with murder in the first degree. He was convicted of manslaughter and appealed to this court. The judgment against him was reversed and the cause remanded to be tried anew. (*State v. O'Brien*, 18 Mont. 1.)

When the cause came on again for trial in the district court, the defendant pleaded that he had already been acquitted of the charge of murder in the first and second degrees, and had also been placed in jeopardy for those offences, because on his former trial he had been found guilty of manslaughter only. In reply to the pleas of former acquittal and former jeopardy, the state admitted that an information had been filed against the defendant charging him with murder in the first degree;

that defendant had been tried under such information, had been found guilty of manslaughter and that judgment on said conviction had been entered against the defendant. The county attorney then asked the court to take judicial notice of the proceedings had on the former trial of the case and to pass upon the pleas of former acquittal and jeopardy entered by the defendant, and to hold said pleas insufficient in law to constitute former acquittal of murder in the first and second degrees, or former jeopardy. No jury was empanelled. The court sustained the defendant's plea as valid and ordered the defendant to be held to await trial for the crime of manslaughter. The state, by the county attorney, excepted to the order of the court and appeals from the order holding the pleas of former acquittal and jeopardy to be valid.

The defendant by motion questions the authority for the appeal from the order of the court. Section 2273, Penal Code, provides as follows :

“ An appeal may be taken by the state :

“ 1. From the judgment for the defendant on a demurrer to the indictment or information.

“ 2. From an order granting a new trial.

“ 3. From an order arresting judgment.

“ 4. From an order made after judgment, affecting the substantial rights of the state.

“ 5. From an order of the court directing the jury to find for the defendant.”

It is contended by the appellant that this case is brought within the terms of the fourth subdivision of the statute quoted, and that when the court made an order to the effect that the defendant's plea of former acquittal was valid, it was equivalent to an order made after judgment, affecting the substantial rights of the state. But in our opinion the ruling of the court was not one made after judgment, because when the former judgment of conviction of manslaughter was set aside by this court, the effect of the decision setting aside the judgment was to put the defendant in a position as if no such judgment ever had been rendered against him. He stood be-

fore the court, so far as he was affected by the pending charge of manslaughter—which point alone we are considering—in the same position as if no trial had been had. This is the express provision of section 2191 of the Penal Code. The ruling of the court only determined that the pleas of former acquittal and jeopardy constituted a defence to the charge of murder in the first and second degrees. Whether or not the defendant had actually been acquitted of the aforesaid charges of murder; and whether or not the said charges were the same offences referred to in the information under which the defendant was to be tried again, and whether or not the defendant had once been in jeopardy under the charges of murder in the first and second degrees, necessarily, under the statutes of Montana, involved issues of fact. Section 1990 provides as follows:

“An issue of fact arises:

“1. Upon a plea of not guilty.

“2. Upon a plea of former conviction or acquittal of the same offense.

“3. Upon a plea of once in jeopardy.”

It being clear, therefore, under the law, that the pleas of defendant raised issues of fact, the court was obliged to submit them to a jury. It may be that by concessions of the defendant the offering of evidence becomes merely the formal introduction of the record of the previous trial with the agreement that there is no difference in the two cases between the identity of the offense charged, and the identity of the defendant, but the issues nevertheless are to go to a jury under appropriate instructions by the court. (Wharton's Criminal Evidence, § 593.)

Section 2143 of the Criminal Code, carrying out the law which declares that the pleas of former acquittal and jeopardy are issues of fact, specifies that the verdict shall be either “for the state” or “for the defendant.” The question therefore, if one at issue, cannot be finally determined without the finding by a jury. In *People v. Kinsey*, 51 Cal. 278, it was decided that the defendant is entitled to a verdict on a

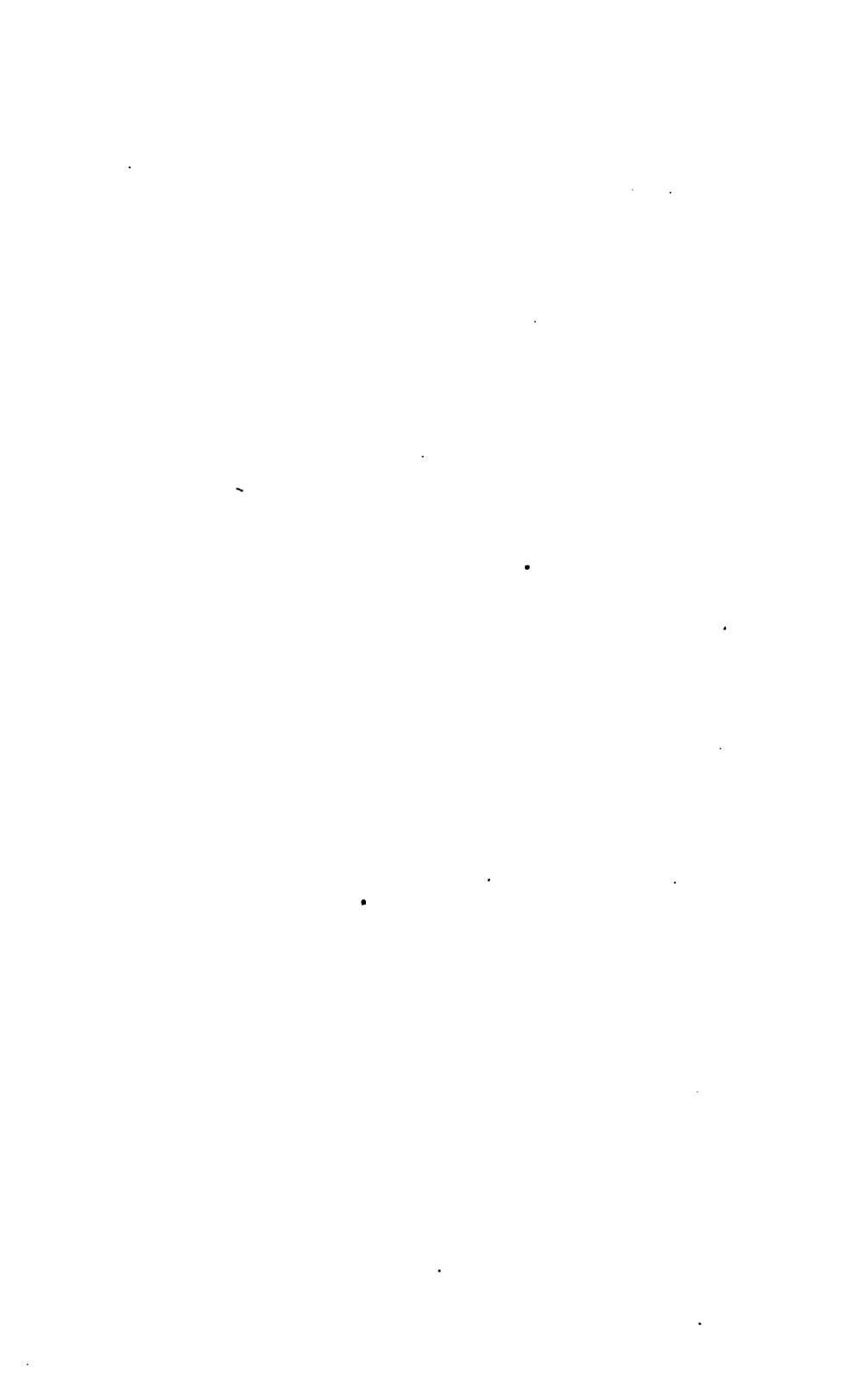
plea of former acquittal entered, and until there is such a verdict there can be no judgment of conviction.

As we look at it, there was no judgment in the case when this appeal was taken, and the issues remain still to be disposed of. The ruling of the district court was an interlocutory one, from which the state could not appeal. (*State v. Pollard*, 83 N. C. 598.)

It follows that the principal and important question which the state seeks to have decided, namely, whether or not the defendant can be tried again for murder, is not before us and cannot be considered.

The appeal is dismissed.

PEMBERTON, C. J. concurs. DE WITT, J., not sitting.



CASES DETERMINED

IN THE

AT THE

DECEMBER TERM, 1896.

PRESIDENT :

HON. WILLIAM Y. PEMBERTON, Chief Justice.

*HON. WILLIAM H. DE WITT, } Associate Justices.
HON. WILLIAM H. HUNT, }

TUTTLE, TRUSTEE, RESPONDENT, *v.* THE MERCHANT'S
NATIONAL BANK OF GREAT FALLS, APPELLANT.

[Submitted November 11, 1896. Decided December 7, 1896.]

TRUSTS—Assignment for Benefit of Creditors.—A conveyance by a debtor of certain real estate by quit-claim deed, in trust, to secure the payment of his indebtedness to certain creditors, together with assignments of a contract for the purchase of real estate and of a receipt for a payment on stock in a corporation, for the same purpose, is in effect an assignment for the benefit of creditors.

SAME.—Death of Trustee.—Jurisdiction of Court of Equity to Appoint Successor.—Where the trustee of an express trust dies after instituting an action to confirm his title to the trust property, a court of equity has inherent power, independently of statute, to appoint a new trustee on its own motion and order his substitution as plaintiff.

***Succeeded, Jan. 4, 1897, by HON. HORACE E. BUCK.**

SAME—Assignment for Benefit of Creditors—Delivery of Property—Fraud.—Where a debtor executes and delivers a bill of sale of a frame building situated upon leased ground, the leasehold to which had expired, to a trustee to secure certain creditors, an unpreferred creditor who attached the building as realty after its transfer to the trustee is not in a position to urge that the transfer is void because the building was personalty and there was no delivery or immediate change of possession as required by section 226, Fifth Division of the Compiled Statutes, since, if the building was personalty, no valid levy was made, and if it was realty it was sufficiently delivered by the conveyance to the trustee made prior to the attachment. And in the absence of circumstances tending to show fraud, a fraudulent intent on the part of the debtor cannot be deduced from want of immediate physical occupation of the building by the trustee considering the nature of the property, where the evidence tended fairly to show that the assignor by his conduct and by the delivery of written instruments, intended to and did voluntarily surrender to the assignee possession of the property for the benefit of his creditors.

SAME—Same—Shares of Stock.—In such case the transfer to the trustee of a receipt for a payment on shares of stock, which was the only instrument which the debtor had evidencing his interest in the stock, was a sufficient delivery as against creditors not provided for in the trust deed, it appearing that the trustee afterwards voted the stock at the corporation's meetings and otherwise exercised full possession of it.

Appeal from Eighth Judicial District, Cascade County.

ACTION by trustee to confirm his title to trust property. The cause was tried before BENTON, J. Plaintiff had judgment below. Affirmed.

Statement of the case by the Justice delivering the opinion.

F. B. Tuttle, as trustee, instituted this action in Sept. 1892, alleging that the firm of Hanks & Fullerton were indebted to certain insurance companies in large sums, which they failed to pay on demand, and that to secure the indebtedness to such companies the defendant Fullerton and his wife, on July 22d, 1893, executed, acknowledged and delivered a quit claim deed of certain realties, in trust, to secure the sums due to such insurance companies. To further provide for the indebtedness Fullerton and his wife executed and delivered to Tuttle, as trustee, an assignment in writing of a contract for the purchase of a lot in Great Falls, Montana; Fullerton and wife also executed and delivered to Tuttle, as trustee, afore-said, a bill of sale for a one-story frame building; the firm also executed and delivered for further security a written assignment to plaintiff, as trustee, of all the right, title and interest the firm of Hanks & Fullerton had in the Great Falls Improvement Company. This last assignment was signed by

Hanks & Fullerton by Fullerton. The instrument was simply a receipt by the Great Falls Improvement Company to Hanks & Fullerton for \$2,750 "being 55 per cent. of your stock in the Great Falls Improvement Company, and the final payment for the year 1892." The plaintiff alleged in his complaint that the defendant bank claimed some interest in the property transferred and asked for judgment adjudging their interest subordinate to the interest of the insurance companies, and prayed the court to confirm his title, as trustee, to the property transferred, that he be directed to execute the trust, and for further relief.

The defendant bank denied that the instruments under which Tuttle claimed were executed before the 24th of July, 1893, and alleged that on July 22d, 1893, and prior to the transfer of the property to Tuttle, and prior to the execution of the instruments, the property had been levied upon under writs of attachment by the bank in suits against Hanks & Fullerton and against Fullerton. The answer avers fraud in the execution of the instruments for the purposes of defrauding the appellant bank.

While the action was pending Tuttle, the trustee, died. When the case was called for trial on July 14th, 1894, the appellant bank having suggested to the court that Tuttle was dead and that no person had been substituted as plaintiff in his stead, was granted leave to file a supplemental answer setting forth the fact of Tuttle's death. Tuttle's death being confessed, the court of its own motion appointed C. M. Webster as trustee of the trust set up in the complaint, and ordered that the said Webster be substituted as plaintiff. Webster appeared in open court and accepted the trust. The defendant bank's counsel excepted to so much of the order as related to the appointment of a trustee as a part of the proceedings in the action. The trial proceeded then to the court. Testimony was heard and findings and judgment made in favor of the plaintiff. The defendant bank moved for a new trial. This motion was overruled, and from the order overruling that motion and from the judgment the bank appeals.

The findings of the court established the indebtedness of Hanks & Fullerton to the insurance companies; set forth the execution and delivery of the instruments of transfer to Tuttle, as trustee, and that all of said instruments were made in good faith, and not with a view of cheating or defrauding the defendant bank, and that each and all of said transfers were made, executed and delivered before the bank commenced action against Hanks & Fullerton and Fullerton.

As conclusions of law the court found that the instruments were valid and lawful conveyances in trust, and that the attachment liens of the defendant bank were subject to the conveyances to the plaintiff.

The judgment directed the trustee to sell the property in the manner prescribed by law for the sale of property under execution, and that after payment to the trustee of the amount found due to him with interest thereon, any balance, if there should be any, was to be deposited with the clerk of the district court. No objection is made to the form of the decree.

Thomas E. Brady, for Appellants.

I. After the death of the plaintiff, Tuttle, the action could be continued and maintained only by his representatives or successors in interest. (§ 22, Code of Civil Procedure.) Tuttle did not sue as mortgagee, but as trustee, and alleged in his complaint that he was the *owner* of the property. There was nothing in the pleadings or in the evidence to modify the language of the instruments, and if they had any effect it was to vest the legal title to the property in Tuttle. (*Bateman v. Burr*, 57 Cal. 482; § 278, Fifth Div. of the Comp. Stat.; *Perry on Trusts* (4th Ed.) § 602. 304, 311, 313, 316, 328; *Snelling v. Lamar*, 32 S. C. 72; *Townshend v. Fommer*, 125 N. Y. 446; *Schanawerk v. Hobrecht*, 22 S. W. Rep. 949.) And the general rule is that on the death of the trustee, unless the statutes provide otherwise, the title to the real estate covered by the trust passes to his heirs and the personal property vests in his executor or administrator. (*Perry on Trusts*, § 341, 342, 344, 346; *Am. & Eng. Ency.*, Vol. 27, page

92 and note; *Tyler v. Mayre*, 95 Cal. 160.) There was no provision made in the instruments for the appointment of a new trustee on the death of Tuttle and in such case, in the absence of statutory authority, the courts have no power to appoint a new trustee. (Perry on Trusts, § 287.) As Webster was not shown to be either an heir or a duly qualified and acting executor or administrator of Tuttle, he was neither a representative nor successor in interest and the court had no jurisdiction to substitute him as plaintiff in the action. (*Wright v. Phipps*, 58 Fed. Rep. 552; *Harlow v. Mister*, 64 Miss. 25; *Jones on Mortgages*, (5th Ed.) §§ 1387, 1388.) Wherever a substitution of parties is proper, it can only be effected by proper proceedings. An opportunity must be given to all persons interested to assert their rights and objections and the person substituted must by proper pleadings show his right to proceed. (*Central, Etc. v. Andrews*, 9 Pac. 213 (Kan.); Perry on Trusts, § 282-294.)

II. The attempted transfer of the stock to Tuttle was void as to appellant, not only for the reasons making the sale of the building void, but also because it was not made in the manner required by sections 455 and 471, Fifth Division of the Compiled Statutes. (*Conway v. John*, 23 Pac. 170 (Colo.); *Cook on Stock and Stockholders* (3rd Ed.) § 489.) It was also void as an unauthorized attempt to transfer or create a trust in co-partnership property by only one member of the firm. (*Stein v. LaDaw*, 13 Minn. 412; *Hill v. Postley*, 17 S. E. Rep. 946.)

Alex. C. Botkin, for Respondent.

I. A court in the exercise of equity jurisdiction has power to fill a vacant trusteeship by appointment; and this is especially true when a suit is pending for the administration of the trust. (Perry on Trusts, § 282; *Buchanan v. Hart*, 31 Texas. 647; *Dailey v. New Haven*, 60 Conn. 314; *In re Petranek*, 79 Iowa 410; *Chapman v. Kimball*, 83 Me. 389; *Wilson v. Tivole*, 36 N. H. 129; *Schlesinger v. Mallard*, 70 Cal. 326;

STATE, APPELLANT, v. O'BRIEN, RESPONDENT.

[Submitted November 10, 1896. Decided November 30, 1896.]

CRIMINAL PRACTICE—Appealable order—Former acquittal and jeopardy.—An order of the district court sustaining a defendant's pleas of formal acquittal and jeopardy, after the reversal of a conviction for manslaughter under an indictment charging murder in the first degree, is not an appealable order under subdivision 4 of section 2273 of the Penal Code, providing that an appeal may be taken by the state "from an order made after judgment, affecting the substantial rights of the state," since the defendant, after his conviction was set aside by the appellate court, stood before the court in the same position as if no judgment had been rendered against him.

SAME—Former acquittal and jeopardy—Jury trial.—The pleas of former acquittal and once in jeopardy involve issues of fact under section 1990 of the Penal Code and therefore cannot be determined without a finding by a jury.

Appeal from Eighth Judicial District, Cascade County.

INFORMATION for murder in the first degree. The defendant's pleas of former acquittal and former jeopardy were sustained by BENTON, J. Appeal dismissed.

Henri J. Haskell, Attorney General, for the State, Appellant.

Leslie & Downing, for Respondent.

HUNT, J.—The defendant was originally tried before the district court of Cascade county under an information charging him with murder in the first degree. He was convicted of manslaughter and appealed to this court. The judgment against him was reversed and the cause remanded to be tried anew. (*State v. O'Brien*, 18 Mont. 1.)

When the cause came on again for trial in the district court, the defendant pleaded that he had already been acquitted of the charge of murder in the first and second degrees, and had also been placed in jeopardy for those offences, because on his former trial he had been found guilty of manslaughter only. In reply to the pleas of former acquittal and former jeopardy, the state admitted that an information had been filed against the defendant charging him with murder in the first degree;

that defendant had been tried under such information, had been found guilty of manslaughter and that judgment on said conviction had been entered against the defendant. The county attorney then asked the court to take judicial notice of the proceedings had on the former trial of the case and to pass upon the pleas of former acquittal and jeopardy entered by the defendant, and to hold said pleas insufficient in law to constitute former acquittal of murder in the first and second degrees, or former jeopardy. No jury was empanelled. The court sustained the defendant's plea as valid and ordered the defendant to be held to await trial for the crime of manslaughter. The state, by the county attorney, excepted to the order of the court and appeals from the order holding the pleas of former acquittal and jeopardy to be valid.

The defendant by motion questions the authority for the appeal from the order of the court. Section 2273, Penal Code, provides as follows :

“An appeal may be taken by the state :

“1. From the judgment for the defendant on a demurrer to the indictment or information.

“2. From an order granting a new trial.

“3. From an order arresting judgment.

“4. From an order made after judgment, affecting the substantial rights of the state.

“5. From an order of the court directing the jury to find for the defendant.”

It is contended by the appellant that this case is brought within the terms of the fourth subdivision of the statute quoted, and that when the court made an order to the effect that the defendant's plea of former acquittal was valid, it was equivalent to an order made after judgment, affecting the substantial rights of the state. But in our opinion the ruling of the court was not one made after judgment, because when the former judgment of conviction of manslaughter was set aside by this court, the effect of the decision setting aside the judgment was to put the defendant in a position as if no such judgment ever had been rendered against him. He stood be-

ognized in *The Matter of Eastern Railroad Co.*, 120 Mass. 412, where it was held that the supreme judicial court of Massachusetts was authorized in cases of trusts, which would not be complete until a trustee was appointed to appoint trustees for the purpose of selling, or conveying or holding and managing the property.

The rule is thus stated by Pomeroy in his *Equity Jurisprudence*, § 1087:

“Courts of equity, therefore, independently of statute, possess the inherent power and jurisdiction to appoint new trustees whenever such action is necessary to protect the rights of the beneficiaries. In the absence of any other method prescribed by the instrument creating the trust, a court of equity will appoint trustees when none at all have been named by the creator of the trust, and will appoint new trustees when those originally named refuse to accept, or when a vacancy occurs by their death, resignation, permanent residence in a foreign country, or removal from office, as heretofore described.”

The principle, as applicable to cases where the trustee, after taking possession of the property, dies without rendering any account, is sustained in the case of *Gorsuch, Trustee, v. Briscoe, Trustee*, 56 Md. 573. There one Eden made a deed of trust for the benefit of his creditors to one Alexander. The trustee took possession and died without rendering any account. It appeared that he was indebted to the trust estate. The creditors petitioned for the appointment of a trustee to complete and settle the trust. The court upheld the appointment of a trustee in the following language:

“We can see no objection to the appointment of a trustee by a court of equity in a case like this for the purpose of settling the trust. The former trustee had died with trust funds in his hands unaccounted for, and the appointment of another trustee to take charge of the trust estate was but the ordinary exercise of equity jurisdiction. So long as there was a trust in existence, a court of equity would not permit it to fail.”

In the case of *Batesville Institute v. Kauffman*, 18 Wall.

151, the supreme court overruled a demurrer resting upon an objection that the trustee being dead, and no successor having been appointed, the trust recited in a deed of trust could not be enforced, saying :

“That the court has power to appoint a new trustee, and to compel the performance of the trust by him, is quite certain. It is, however, equally within the power of a court of equity to decree and enforce the execution of the trust through its own officers and agents, without the intervention of a new trustee.”

Burrill on Assignments, § 415, recognizes the rule that where an assignee dies before the trust is finally executed, the court may appoint a new assignee, or select some other person to discharge the duties of the trust.

It was likewise decided in *People v. Norton*, 9 N. Y. 176, that the court of chancery with its general jurisdiction of all cases of trust had power by its general authority, independent of any statutes, to displace a trustee on good cause shown and to substitute another in his stead. (See also Sugden on Powers, 507.)

If additional authority were required it would be easy to add a list of cases to those we have selected, but the proposition seems fundamental and therefore need not be dwelt upon.

If the fitness of the trustees selected were questioned, or if objection to his appointment were made because the interest of the *cestuis que trusts* would not all be fairly looked after, or if it appeared that the execution of the trust would in any way be impeded, appellant's position would be different. But, the objections being independent of any such considerations as those just suggested we think it was proper for the court, when advised by the appellant of the death of the trustee, to make an appointment in order that the very purposes of the trust might be carried into execution. (*In re Tempest*, Vol. I, E. L. R. Ch. App. cases, page 485.)

Included in the property assigned in trust to Tuttle was a frame building, situated upon leased ground, the leasehold of which had expired. This building was attached by appellant

as a portion of the Hanks & Fullerton real estate—that is, the sheriff filed with the clerk and recorder a copy of the writ and a notice of attachment that certain realty and this building were attached. No actual possession was ever pretended to be taken by the sheriff, yet appellant contends that the transfer to Tuttle, as trustee, was void because there was no delivery or immediate change of possession, as contemplated by § 226, Fifth Division Compiled Statutes of 1887. As this section applies to assignments of goods and chattels, the appellant's position is not altogether consistent. Plainly, if the property was personalty and actual possession were necessary, no valid levy was made by the appellant, while if it was realty—as appellant evidently regarded it when it attached—it was sufficiently delivered to the trustee—at least until a reasonable time elapsed—by mere delivery of the deed to Tuttle, which was found to have been before the appellant's attachment was made. (Burrill on Assignments, § 243.) Appellant is, therefore, in no position to urge the line of argument he pursues.

Whether the assignment of this building and of the other property transferred was fraudulently made for the purpose of defrauding appellant in the collection of its judgment, and consequently was wholly void, was, however, made an issue at the trial and was found against appellant. This issue might have properly involved the question of the delivery of this building to the assignee. But the court evidently treated the building as personalty, and found that the assignors delivered possession of the same to the trustee Tuttle before the defendant bank attached. Probably the delivery was made upon the theory that the instrument of transfer to Tuttle, as trustee, was of the nature of a chattel mortgage, where possession was delivered to the trustee named; but the fact of the delivery of possession was found, and, considering the peculiar nature of the property and the impossibility of physical delivery, we cannot now say that possession of it was withheld by Hanks & Fullerton and thus imply fraud. We think the evidence fairly tends to show that by their conduct and the delivery of the written instruments, the assignors intended to give up, and

did voluntarily give up, to the trustee, possession of all the property assigned, including possession of this building, for the benefit of their creditors. At least, in the absence of some circumstance tending to show fraud, we cannot deduce a fraudulent intent on the part of the assignors, solely because the assignee Tuttle did not have instantaneous physical occupation of the building.

The remaining contention of appellant is that the assignors did not deliver certain stock in the Great Falls Improvement Company to the assignee. But the evidence is that the paper delivered to the assignee, and transferred in writing to him, was the only instrument which the assignors themselves ever had evidencing their interest in the shares of the corporation, and consisted of a receipt to Hanks & Fullerton for \$2,750.00, being 55 per cent. of their stock in the company. It appears that Tuttle, as trustee, afterwards voted in behalf of those shares at the corporation's meetings and exercised full possession of the shares to which the assignors might have been entitled. Under such circumstances we think the property was delivered.

Appellant makes the further point in his brief that the delivery of this receipt was void because the written instrument of transfer was signed by only one member of the firm of Hanks & Fullerton. But as this question was not raised by an assignment of error, it was not before the district court for review, and is not before us on appeal. This disposes of all errors relied on.

The judgment is affirmed.

Affirmed.

PEMBERTON, C. J., and DEWITT, J., concur.

WOOD, RESPONDENT, v. GLEIM, APPELLANT.

[Submitted November 2, 1896. Decided December 7, 1896.]

APPEAL—New Trial—Sufficiency of Record.—An order denying a new trial will be affirmed on appeal where the record contains no statement of the case, or specifications of errors of law or insufficiency of evidence.

Appeal from Fourth Judicial District, Missoula County.

ASSUMPSIT. Judgment was rendered for the plaintiff below by WOODY, J. Affirmed.

Crouch & Musgrave, for Appellant.

J. K. Wood, for Respondent.

PER CURIAM. The plaintiff obtained judgment against the defendant on account of services rendered to her as an attorney-at-law. The defendant moved for a new trial. From the order denying the same and from the judgment the defendant appeals.

The notice of motion for a new trial sets forth that a motion would be made on a statement of the case. No statement of the case appears in the record, nor, as far as the record discloses, was any ever prepared. There is no specification of errors of law, or of particulars in which the evidence is insufficient to sustain the verdict. No such alleged errors can, therefore, be considered. This disposes of the appeal from the order denying the motion for a new trial.

In examining the appeal from the judgment there is no error apparent in the judgment roll. The judgment and order denying a new trial are therefore affirmed.

LYNDE, ADMINISTRATOR, RESPONDENT, v. WAKEFIELD,
APPELLANT.

[Submitted April 3, 1896. Decided December 7, 1896.]

DOWER—Abatement of Action—Rents and Profits.—An action by a widow to recover a dower right and for the value of rents and profits, does not abate upon her death but survives to her legal representatives under section 22 of the Code of Civil Procedure (1887) providing that an action shall not abate by the death of a party but shall survive and be maintained by his representatives or successors in interest.

SAME—Statute of Limitations.—An action by a widow for an assignment of dower and to recover rents and profits is not within the general statutes of limitation of the Code of Civil Procedure of 1887. (*Burt v. C. W. Cook Sheep Co.*, 10 Mont. 571. *Affirmed.*)

SAME—Sheriff's Deed.—A sheriff's deed to lands sold under a judgment against the husband conveys to the purchaser only the title of the husband and not the wife's inchoate right of dower.

SAME—Quit-Claim Deed.—A quit-claim deed executed by a judgment debtor after the sale of his land under on execution conveys merely the right of redemption and does not affect the wife's right of dower.

Appeal from Ninth Judicial District, Gallatin County.

ACTION for dower. The cause was tried before DuBOSE, J., sitting in place of ARMSTRONG, J. Plaintiff had judgment below. Affirmed.

Statement of the case by the Justice delivering the opinion.

Leander M. Black in the year 1881 died in the county of Gallatin in this State. During his lifetime he had been the owner in fee of a large amount of real estate, situated in the city of Bozeman in said county, and which real estate is described in the complaint in this action. The said Leander M. Black left surviving him as his widow and relict Mary A. Black, the original plaintiff in this case.

It appears from the record that during the years 1876, 1877 and 1878 the real estate mentioned in the complaint as having been the property of said Leander M. Black, was attached in divers suits commenced against him by divers parties in the district court of Gallatin county; that judgments were obtained in said suits against said Black, and on the 22d day of January, 1879, all of said real estate was sold by the sheriff

of said county upon execution at public sale to one Geo. W. Wakefield, and a certificate of sale regularly given to said purchaser by the sheriff of said county; that said Wakefield assigned said certificate of purchase to one Joseph J. Davis, and by direction of said Wakefield the sheriff of said county on the 25th day of July, 1879, the time of redemption having expired, made to said Joseph J. Davis a deed conveying to him said lands; that afterwards by *mesne* conveyances the titles of said property were conveyed from Joseph J. Davis to the defendant Geo. W. Wakefield, who now claims to be the owner of said real estate. The record further shows that the real estate was sold by the sheriff, but before the sheriff had executed his deed to the purchaser thereof, the said Leander M. Black made a quit-claim deed embracing all of said property to one E. W. Toole. No attempt was ever made by anyone to redeem said lands or any part thereof at any time. It is not disputed that the defendant Wakefield is in possession of said real estate, and has been in such possession since his purchase at said sheriff sale. The complaint alleges the property to be of the value of \$15,000, and its rental value to be \$1,500 per annum.

On the 12th day of February, 1894, Mary A. Black filed her amended complaint in this suit, claiming her dower rights and interest in said real estate, and for the value of the rents and profits during the time she had been deforced of her dower by the defendant.

The case was tried to the court without a jury. Judgment was rendered by the court that Mary A. Black have and recover dower in the premises described in the complaint, and a commission was appointed to lay off and allot to her her dower in the premises. From the judgment and an order overruling a motion for a new trial, the defendant appeals.

After the appeal to this court, Mary A. Black, the respondent, died intestate, and on the 24th day of March, 1896, a motion was made to substitute T. J. Lynde, her administrator, as respondent in the cause and that the same proceed in his name.

Luce & Luce and Toole & Wallace, for Appellant.

Smith & Word, for Respondent.

PEMBERTON, C. J.—Counsel for the appellant object to the substitution of the administration of Mary A. Black, because, they contend, the entire cause of action abated by her death, and that the right to sue for and collect the rents and profits of the dower estate, which had accrued between the time Mary A. Black commenced her suit and her death, does not survive to her legal representative. This contention presents the first question for our consideration.

This cause was commenced under, and must be determined by, the provisions of § 22, page 63, Code Civil Procedure, Compiled Statutes 1887, which is as follows:

“An action, or cause of action, or defense, shall not abate by the death, marriage or other disability of a party, or by the transfer of any interest therein, but shall, in all cases where a cause of action or defense arose in favor of such party prior to his death, marriage or other disability, or transfer of interest therein, survive, and be maintained by his representatives or successors in interest; and in case such action has not been begun or defense interposed, the action may be begun or defense set up, in the name of his representatives or successors in interest; and in case the action has been begun or defense set up, the courts shall, on motion, allow the action or proceeding to be continued by or against his representatives or successors in interest. In case of any transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding.”

We are aware that at the common law, if the widow die before the damages in such cases are assessed, her personal representatives cannot claim or recover them. (§ 625, Story's Equity Jurisprudence, Vol. 1, 10th Ed.) This is so clear to our minds that we will not cite further authority, or further discuss the question.

But we think under our statute, and the great weight of authority, a different rule prevails in equity. Judge Story in the same section referred to above says:

“But a court of equity will, in such cases, entertain a bill for relief; and decree an account of rents and profits against the respective representatives of the several persons who may have been in possession of the estate since the death of the husband; provided, at the time of filing the bill, the legal right to damages is not gone.”

And in § 626 following the same author says:

“Upon principle, there would not seem to be any real difficulty in maintaining the concurrent jurisdiction in courts of equity in all cases of dower; for a case can scarcely be supposed in which the widow may not want either a discovery of the title deeds, or of dowable lands; or some impediment to her recovery at law removed; or on account of *mesne* profits before the assignment of dower; or a more full ascertainment of the relative values of the dowable lands; and, for any of these purposes (independent of cases of accident, mistake or fraud, or other occasional equities) there seems to be a positive necessity for the assistance of a court of equity. And, if a court of equity has once a just possession of the cause in point of jurisdiction, there seems to be no reason why it should stop short of giving full relief, instead of turning the dowress round to her ultimate remedy at law, which is often dilatory, and always expensive. Dower is favored, as well in law as in equity.”

In *Pollitt v. Kerr*, 49 N. J. Equity R. 65. the rule at law and in equity in such cases is ably discussed and the authorities collated. In that case the court says of the rule at law:

“The reason given for the rule is, that damages can only be given for the detention of the possession, and in writs of right, where the right itself is disputed, no damages are given, because no wrong is done until the right is determined. This is the rule at law. By force of it, it is clear that the petitioner, if he were in a court of law, would be without a right, and, consequently, without a remedy.”

The court then continues:

"A somewhat more liberal rule in favor of the widow prevails in equity. The rule in equity I understand to be this: That where a widow files a bill in chancery for dower, and dies pending the suit, her personal representative may revive the suit and recover *mesne* profits. This is the rule that Lord Alvanley enforced in *Curtis v. Curtis*, 2 Brown Ch. C. 620. In that case a widow filed a bill for dower against her husband's brother. The defendant denied the fact of marriage. The court thereupon directed that the bill be retained until the widow established her right by a judgment at law. She then brought an action at law and had a recovery and then died. On a bill of revivor and supplement, Lord Alvanley held that the widow's personal representative was entitled to a decree for *mesne* profits. Park states the rule in equity as follows:

"We have seen that at law the widow loses her damages if the tenant dies after judgment, and before they are assessed, and, also, that if she herself dies before the damages are ascertained, her personal representative cannot claim them. But in equity, a different rule prevails, and the court will decree an account of rents and profits against the persons who have been in possession since the death of the husband, provided that at the time when the bill is filed the *legal right to damages was not gone.*" (Park, Dow. 330.)

Judge Story states the rule in almost precisely the same words. (1 Story on Equity Jurisprudence, § 625.) "The instances in which the court has been called upon to apply the rule are but few in number, but in every instance, where it was applicable, that has come under my observation the rule has been enforced." To the same effect see *Magruder v. Smith*, 79 Ky. 512; *McLaughlin v. McLaughlin*, 20 N. J. E. R. 190; *Paul's Exs. v. Paul*, 36 Pa. St. 270; *Harper v. Archer, et. al.*, 28 Miss. 212; *Price v. Hobbs*, 47 Md. 359. We think it useless to cite further authority upon this question.

We are clearly of the opinion under our system of jurisprudence, where we have "but one form of civil action for

the enforcement or protection of private rights, and the redress or prevention of private wrongs which shall be same at law and in equity," (§ 1, Chap. I, Code Civil Procedure, Compiled Statutes 1887) and where law and equity are merged in the same tribunals, that the right to prosecute this suit for the collection of the rents and profits of the dower estate of Mary A. Black survives to her legal representative.

Counsel for appellant contend that if Mary A. Black was ever entitled to dower in the real estate mentioned in the complaint, her right thereto is barred by the statute of limitations.

The question as to whether a widow's dower is barred by the general statutes of limitations in this state was determined by this court in *Burt v. C. W. Cook Sheep Co.*, 10 Mont. 571, and in that case we held her right of action was not so barred. We think that case decisive of the question raised in the case at bar.

Counsel for appellant contend that the statute was not properly before the court in *Burt v. C. W. Cook Sheep Co.* This contention is not supported by any sufficient showing, for in that case the court not only held that it was raised, but said it had been argued "with great ability and research." And besides, we think *Burt v. C. W. Cook Sheep Co.* is in harmony with the best reasoning, and supported by the great weight of authority on the subject.

Counsel for appellant contend also that the widow is not entitled to dower in the lands described in the complaint, because, they say, the sheriff's deed to the lands conveyed the whole title, relieved of dower. In the ably written opinion on file in this cause of the Hon. Dudley DuBose, the judge who tried the case below, we find this language in reference to the effect of such a sale upon the widow's dower:

"The court is of the opinion that, under our statute, the only title the purchaser obtains at a sheriff's sale is the title of the husband and not the inchoate right of dower of the wife. This doctrine is laid down by the Supreme Court of New Jersey, and by the Supreme Courts of Illinois, Mas-a-

chusetts, Ohio, Missouri, Indiana, New York, Maryland; and by Kent, Scribner on Dower and Williams on Real Property, and many other cases.”

In *Harrison v. Eldridge*, 7 N. J. Law R. (2 Halsted) 408, the court in discussing the question as to whether a sale by the sheriff on a common law judgment will bar the widow of dower, says:

“It has been repeatedly determined that by such a proceeding the widow’s claim will not be affected, and the doctrine of the law is conclusively settled upon that point.” (§ 340 Code of Civil Procedure of Montana; *Barker v. Parker*, 17 Mass. 564; Vol. 4, Kent Com. page 45; 1 Scribner on Dower, page 603; Williams on Real Property 224; *Ayer v. Spring*, 10 Mass. 80; *Blain v. Harrison*, 11 Ill. 384; *Sumners v. Rabb*, 13 Ill. 483; *McClanahan v. Porter*, 10 Mo. 746; *Taylor v. Fowler*, 18 Ohio 567; 26 Am. Dec. 225 and note; 87 Am. Dec. 346; *Nance v. Hooper*, 11 Ala. 552; Herman on Executors, pages 359, 360 and 364; *Merchant’s Bank v. Thompson*, 55 N. Y. 7; *Dunham v. Osborne* 1 Paige Chan. 634; Freeman on Executions, page 560, § 388; 22 Am. Dec. 710 and note; 51 Am. Dec. 470; *Dayton v. Corser*, 53 N. W. 717 (Minn.); *Vinson v. Gentry*, 21 S. W. 578 (Ky.); *House v. Toole*, 29 Pac. 890 (Or.); *Blevins v. Smith*, 16 S. W. 213; *Smith v. Rothchild*, 4 O. Cir. R. 544.)

The court below held that the quit claim deed executed by Black to E. W. Toole of the lands in question after the same had been sold by the sheriff, but before the sheriff’s deed had been executed, amounted in effect to a sale of the right to redeem the land. We think this a correct view of the question. Black at the date of the quit claim deed only had the right of redemption. He could sell no more than he had. There was no redemption by Toole, and consequently he never acquired any title to the land.

We think the contention that Black’s deed to Toole conveyed the whole title to the lands relieved of dower, because Mary A. Black was not residing in the state at the time is without foundation, especially as Toole, by failing to redeem never acquired any title to the land.

We have considered all the questions presented by the record in this case. We are of the opinion that the only serious question involved is as to whether the right to collect rents and profits survived to Mrs. Black's representative upon her death.

Having disposed of that question against the appellant we are of the opinion that the other assignments of error are without merit, although we have treated some of them at considerable length. T. J. Lynde, administrator of Mary A. Black, deceased, will be substituted for Mary A. Black as respondent and the suit will proceed in his name. The judgment and order appealed from are affirmed.

The cause, however, is remanded with instructions to the court below to take such proceedings as are authorized by law and proper to ascertain the value of the rents and profits of the dower estate from the time of the commencement of the suit by Mary A. Black to her death, and that when the value of such rents and profits has been ascertained, judgment be entered for the amount with costs in favor of the legal representative of said Mary A. Black.

Affirmed.

DEWITT, J., and HUNT, J., concur.

JOHNSON, APPELLANT, v. THE PURITAN MINING
COMPANY, ET AL., RESPONDENTS, and MURRAY,
APPELLANT.

[Submitted November 19, 1896. Decided December 14, 1896.]

MECHANIC'S LIEN—Appeal—Service of Notice as Between Defendants—Jurisdiction.—

Where in a lien foreclosure the defendants, some of whom claimed under a prior mortgage and one under a prior judgment lien, united in the defense, all being represented by the same counsel, and on the trial the mortgagee defendants prevailed while the judgment defendant was defeated, and on an appeal by the plaintiff and the unsuccessful defendant the original counsel for the defendants who represented them below again appeared insisting that there was still no conflict of interests between their clients, while new counsel then appearing for the mortgagee defendants for the first time insisted that there was a conflict of interests and objected to the jurisdiction of the appellate court because no notice of appeal was served on the

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mortgagee defendants by their co-defendant, the supreme court will, under such circumstances, entertain jurisdiction of the appeal and provide for a determination of the rights of the mortgagee defendants so far as they may be affected by a reversal on their co-defendants appeal.

SAME—Priorities—Mining Claims.—Under section 1374, Fifth Division of the Compiled Statutes extending a lien for labor and materials to the land upon which the building or improvement is situated and giving it precedence over any mortgage made subsequent to the commencement of the work, and section 1376, *Id.*, providing that the lien shall attach to the improvement in preference to any prior mortgage on the land and permitting the enforcement of the lien by the sale of the improvement under execution and its removal within a reasonable time, the lien of a mechanic as to the improvement is superior to a prior mortgage on the land, but as to the land itself the prior mortgage maintains precedence, and therefore, where a lien claimant has not erected a building or placed such an improvement upon a mining claim, as is susceptible of severance or removal, his lien must yield to a prior mortgage upon the premises.

SAME—Judgment Roll—Evidence—Verification of Pleading.—Verification is not necessary to vest jurisdiction, and therefore where one of the defendants in a lien foreclosure relied upon a judgment lien as prior to the plaintiff's lien it was error to exclude the judgment roll in the action wherein he recovered the judgment merely because the complaint was not verified.

SAME—Evidence—Ownership of Judgment.—In a mechanic's lien foreclosure where one of the defendants relied upon a judgment lien as prior to the plaintiff's lien and an execution had been issued on motion after five years from entry of his judgment, it was error to exclude the judgment roll, execution, motion papers and sheriff's deed on the ground that the said defendant was not the owner of the judgment at the time the motion for execution was made, since as the judgment debtor had raised no objection to the issuance of the execution and as it had been issued in the name of the party in whose favor it was rendered, the ownership of the judgment was of no concern to the plaintiff.

Appeal from Third Judicial District, Granite County.

FORECLOSURE of mechanic's lien. Judgment was rendered for the defendant mortgagees by BRANTLEY, J. Affirmed on plaintiff's appeal and reversed on appeal of defendant Murray.

Statement of the case by the justice delivering the opinion.

Levi C. Johnson, plaintiff in this action, alleged fifty-seven causes of action upon liens for materials furnished to the Puritan Mining and Milling Company, defendant, or for labor performed upon the mines of said company. The times within which the materials were furnished and the labor performed in all of the causes of action set forth are between September 1893 and March 1894. The plaintiff prayed for judgment against the Puritan Mining and Milling Co., and that the same be declared a lien on said mining claims and that they be sold to satisfy the judgment.

Defendants Hines and wife, Lynch, and the executor of Mary Minuse, answered and denied the several causes of action set up in plaintiff's complaint and pleaded that they were the owners of a mortgage made to them upon the claims of the Puritan Mining and Milling Company on May 21st, 1892, to secure certain debts of the corporation. The defendant King also claims to be the owner of a mortgage upon the same mining claims, executed on May 15th, 1893. King's mortgage recognizes the former one to Hines, Lynch, et al., so there is no conflict between the interests of these mortgagees.

The contention of the mortgagees was that by virtue of the mortgages their liens were prior to the plaintiff's. The defendant Murray claimed a one-fifth interest in the mining claims of the Puritan Mining Company by reason of his being the judgment creditor of one John Ullery, the predecessor in interest of the defendant Puritan Mining and Milling Company. He pleaded that his judgment lien existed by virtue of a judgment obtained in a suit of *Murray v. Ullery* wherein he recovered judgment in December, 1887 against Ullery for the sum of \$2,062.81, together with interest and costs, and that on June 29th, 1893, under his execution issued upon said judgment, the sheriff sold a one-fifth interest in the mining claims involved in this suit, to him, Murray, and thereafter on December 30th, 1893, the sheriff executed to him a sheriff's deed. By reason of these facts Murray asserted that his interest in said mining claims was prior and superior to plaintiff's lien.

The plaintiff filed no replication to the answers of the mortgagees, but did reply to Murray's answer denying the averments of the same.

Upon the trial it was agreed by all parties that the materials were furnished and the labor was performed as alleged in the complaint. Murray then offered in evidence the judgment roll in the case of *Murray v. Ullery*, filed December 7, 1887, the motion and affidavit for execution, the execution issued on said judgment May 1st, 1893, and the deed from the sheriff to J. A. Murray, conveying to Murray the interest of Ullery in

the mining claims described in the complaint, filed for record January 4th, 1894. The plaintiff objected to the admission of the judgment roll, motion, execution and sheriff's deed on the ground that the complaint in said judgment roll was not verified, and because it appeared from the papers introduced that J. A. Murray was not the owner of said judgment against Ullery at the time the motion and affidavit for execution were made and filed. The court sustained the plaintiff's objection. Judgment was thereafter rendered in favor of plaintiff for \$8,134.04 and costs including attorney's fees, which said sums were adjudged to be liens upon the Puritan and Silver Star mining claims, the properties of the Puritan Mining and Milling Company; but the court decreed that the defendants mortgagees, by virtue of their mortgages, had prior and superior liens to those of plaintiff's. It was also decreed that the defendant Murray had no lien and could take nothing of the action.

H. R. Whitehill, for Appellant.

The lien given under the Montana statute, upon a mining claim or quartz lode, the improvements being incapable of segregation, is upon the mine itself and is given preference to any prior lien, incumbrance, or mortgage upon the land upon which any buildings, structures, or improvements are erected.

In every case, yet decided by the courts, in which the question has been raised as to the validity of the lien upon the mine itself, instead of the improvements, it has been held that the lien, if it exists at all, extends to the whole claim. The mine, or shafts, stopes, levels and other openings and workings for the development of a quartz lode within a mining claim, is a structure, or improvement, within the meaning of the statute. (*Alvord v. Hendrie*, 2 Mont. 115; *Smith v. Sherman Mining Co.*, 12 Mont. 529; *Helm v. Chapman*, 66 Cal. 292; *Sylvester v. Coe Quartz Mining Co.*, 80 Cal. 510.)

The priority as between such liens and prior incumbrances depends wholly upon the statutes of the different states. (*Davis v. Bisland*, 18 Wall 659; *Cheshire Prov. Inst. v.*

Stone, 52 N. H. 365; *Shepardson v. Johnson*, 60 Iowa 239; *Chadbourn v. Williams*, 71 N. C. 450; *Mellon v. Valentine*, 3 Col. 258.)

As to the statutes of Colorado, Idaho, Nevada, New Mexico and Washington, see II Jones on Liens, §§ 1191, 1198, 1214, 1217, 1230.

This court in the case of the *Grand Opera House v. McGuire*, 14 Mont. 558, in construing § 1376 of the Montana statute, has decided that a mechanic's lien, in so far as the improvements are concerned, takes precedence over a mortgage upon the land, which was made and recorded prior to the commencement of the building. It has also been decided in other cases that the lien has preference over a mortgage made and recorded prior to the commencement of the delivery of materials and the commencement of the work for which the lien was claimed, though the building had been commenced at a date prior to the commencement of the lienor's claim on a different contract, and this for the reason that a purchaser ought not to have the benefit of labor and materials which give the property its existence and value. (*Mason v. Germaine*, 1 Mont. 263; *Merrigan v. English*, 9 Mont. 113; *Davis v. Bisland*, 18 Wall 659.) § 1376 of the Montana Code having displaced and postponed the prior liens of mortgages and other incumbrances upon the land to the subsequent liens for materials and labor used in making improvements, the priorities of such conflicting liens are not governed by the principle in equity, *qui prior est tempore, potior est jure*, but by the statute alone. (*Gallatin County v. Beatty*, 3 Mont. 173; *Williams v. Santa Clara Mining Association*, 66 Cal. 193; *Hall v. Hinckley*, 32 Wis. 362; *Meyer v. Delaware R. R. Co.*, 100 U. S. 457.)

In the state of Iowa a mechanic's lien has preference over a prior recorded mortgage. The statute authorizing such preference is almost identical with § 1376 of the Montana Code, and it is submitted that the Iowa decisions are conclusive of the question here presented. (*Brooks v. Burlington R. R. Co.*, 101 U. S. 443; *Stockwell v. Carpenter*, 27 Iowa 119;

Getchell v. Allen, 34 Iowa 559; *O'Brien v. Pettis*, 42 Iowa 293; *Bear v. Burlington R. R. Co.*, 48 Iowa 619; *Taylor v. Burlington, Etc., R. R. Co.*, 4 Dill. 570.)

Smith and Word, for appellant Murray.

I. The court below erred in holding that the judgment roll in the case of *Murray v. Ullery* was not admissible in evidence because the complaint was not verified. The verification is no part of a pleading and is not necessary to give the court jurisdiction. (Bliss on Code Pleading § 173, note; Boone on Code Pleading, §§ 34, 81, note 22; Maxwell on Code Pleading, pages 563-4; Baylies' Code Pleading, page 310; Van Fleet on Collateral Attack, §§ 251-5; *Johnson v. Jones*, 2 Neb. 126, 138; *Trumble v. Williams*, 18 Neb. 144; 24, N. W. 716, 718; *George v. McAvoy*, 6 How. Pr., 200; *Bank v. Shaw*, 5 Hun. 114; *McCraney v. McCraney*, 5 Ia. 232, 254; *Rush v. Rush*, 46 Ia. 648; *Castleman v. Relfe*, 50 Mo. 583; *Patterson v. Ely*, 19 Cal. 28.)

Where objection is not made until after judgment the defect is waived. (*Dorrington v. Meyer*, 8 Neb. 214; *Hayward v. Grant*, 13 Minn. 165; *Schwarz v. Oppold*, 74 N. Y. 307; *Harris v. Ray*, 15 B. Mont. 630; *Wilkin v. Gilman*, 13 How. Pr. 225; *Bragg v. Bickford*, 4 How. Pr. 21.)

II. At the trial the plaintiff objected to the admission in evidence in the appellant Murray's behalf of the motion and affidavit for execution, execution and sheriff's deed, on the ground that it appeared from the papers introduced that said Murray was not the owner of the judgment at the time the motion was made and affidavit filed. This objection was not well taken. More than five years having elapsed from the entry of the judgment the execution, as the record shows, and the statute required, issued upon the motion and affidavit of Murray, and after personal notice to Ullery. (Code Civil Procedure, § 349.) (1887.) The court made an order that execution issue. This order for execution was appealable. (*N. P. R. R. Co. v. Bender*, 13 Mont. 432.) The record nowhere shows that this order was ever appealed from. The

execution could issue only in the name of the party who recovered the judgment, for if otherwise issued, the execution would not be following the judgment and could not therefore be warranted by it. (C. C. P. § 312 (1887); *Corriell v. Doolittle*, 2 G. Green (Ia.) 387; *Collins v. Smith*, 75 Wis. 395; Freeman on Executions § 21.) As regards strangers and in collateral attacks like the present based upon matter *dehors* the record, the judgment of the court ordering execution to issue and all proceedings had thereunder will be deemed valid for all purposes. (*Edgerton v. Edgerton*, 12 Mont. 122, 149; *Vantleberg v. Black*, 2 Mont. 371; *Wells, Fargo & Co. v. Clarkson*, 5 Mont. 336; *Morrill v. Morrill*, 25 Pac. 362; Van Fleet on Collateral Attack, § 16; Alderson on Judicial Writs, § 14.)

Durfee & Brown and *McConnell & McConnell*, for Respondents.

I. The interest of Murray and the mortgagees manifestly conflict. Both mortgages cover the whole of the Puritan lode and four-fifths of the Silver Star. And the Hynes mortgage provides for the acquisition of the other fifth, if it could be done. To give this court jurisdiction of any party who is adversely interested, even if he is a co-defendant, notice of appeal must be served on him. And this court cannot reverse or modify the judgment so as to affect the rights of the party not served with the notice. (Hayne on New Trial and Appeal, pages 629-630; *Senter v. DeBernal*, 38 Cal. 640; *Thompson v. Ellsworth*, 1 Barb. Ch. R., 627; *Williams v. S. C. Mining Association*, 66 Cal. 195; *Randall v. Hunter*, 69 Cal. 82; *Milikin v. Houghton*, 75 Cal. 540; *O'Kane v. Daly*, 63 Cal. 317.)

II. The question in this case is controlled by §§ 1370, 1374, 1375, 1376. We understand § 1376 applies to a mining claim as well as to any other kind of land. The statutes do not anywhere undertake to give precedence to these liens to the land upon which the improvements were made over that created by a mortgage duly executed before the commence-

ment of work. This preference is confined to the buildings, erections and improvements put upon the land by the lienors. That it was never intended to interfere with the lien of the mortgage upon the land is shown by the fact that the purchaser at the foreclosure sale of the lienor for materials or labor has the right to remove the building, erection or improvement within a reasonable time. The meaning of these statutes is settled by the cases of *Davis v. Alvord*, 94 U. S. 545 and *Grand Opera House v. Maguire*, 14 Mont. 558. Plaintiff has not shown the erection of a single building or other improvements upon the mining claims against which he claims his lien. If a mill, hoist or other improvement capable of being severed from the mining claims had been put there by the material furnished or the labor done by the plaintiff, then he would undoubtedly have the right, under § 1376, to have a decree to sell the same together with the equity of the owner in the claims themselves. The fact that the labor may have been done in sinking shafts, running levels, or tunnels, which are incapable of being removed, cannot change the plain mandate of the statute. Such lienors get the benefit of such improvements in the sale of the equity of the owner in the claim itself whose value is enhanced thereby. When the work done is incapable of severance, such as stopping ore on a mining claim, or digging a well on any kind of land, no special lien is created upon such improvements as distinguished from the realty itself, to which a preference will be given over a pre-existing mortgage. (*Montana L. & M. Co. v. Obelisk M. & M. Co.*, 15 Mont. 20.) The rights of the mortgagee are paramount to those of the mechanic where the mortgage attaches before the house was erected, altered or repaired. (15 Am. & Eng. Ency. of law, page 88, note 1, where 55 cases from 19 states are collected.) It is true, as contended, that the courts hold a lien on a mining claim for materials and labor extends to the whole claim, and is not limited to a specific amount of the realty upon which the improvement is made. But this does not give such liens the preference over pre-existing liens by mortgage or judgment, etc. (*Smith v.*

Sherman Mining Company, 12 Mont. 529; *Grand Opera House Co. v. Maguire*, *supra*.)

HUNT, J.—The only question to consider on the plaintiff's appeal is the specific error that the court ought not to have decreed the mortgage liens of the defendants to be superior to the liens of the plaintiff for materials furnished and labor done upon the mining claims of the Puritan Mining and Milling Company.

Section 1370 of the Compiled Laws of 1887 gives a lien to every laborer or other person who does any work and labor upon, or furnishes any material for, any mining claim, quartz lode, building, erection, etc.

Section 1374 provides that the lien given by section 1370 shall extend to the lot or land upon which any such building, improvement or structure as may be referred to in the aforesaid section, is situated; and provides further that the liens for work or labor done, or material furnished, as specified in the chapter of the statutes referring to liens, shall be prior to and have precedence over any mortgage, incumbrance or other lien made subsequent to the commencement of work on any contract for the erection of such building, structure or other improvement.

Section 1375 declares that any such lien shall extend to all the right, title and interest owned in the land by the owner or proprietor of the building, erection or other improvement for whose immediate benefit the labor was done or the materials were furnished.

Section 1376 provides that such liens or work "shall attach to the buildings, or improvements or erections for which they were furnished, or the work was done, in preference to any prior lien, or incumbrance or mortgage upon the land upon which said buildings, erections or improvements have been erected or put; and any person enforcing such lien may have such building, erection or improvement sold under execution and the purchaser may remove the same within a reasonable time thereafter."

As we must be governed by the foregoing statutes, we shall be careful not to extend the law beyond the expressed intent of the Legislature.

Granting that section 1376 is applicable to mining claims, still we cannot find that it or any other statute gives precedence to liens, such as are involved in this action, upon land upon which the improvements have been made over liens created by mortgages duly executed before the commencement of the work. The statute does make such liens preferred to any prior lien upon the land by attaching them to the *buildings, erections or improvements* for which the labor and materials were furnished, but clearly goes no farther. We find no warrant in the language used to imply that it extends such lien to the land itself, while as conclusive evidence that the construction we put upon the statute is accurate, it is provided that the person enforcing the lien may have "such building, erection or improvement sold under execution and the purchaser may remove the same within a reasonable time thereafter."

We are cited by the appellant to the statutes of Iowa, which are substantially like those that obtained in Montana when plaintiff's cause of action accrued. But we find that the U. S. Supreme Court in *Brooks v. Railway Co.*, 101 U. S. 443, has construed the Iowa statutes similar to sections 1374, 1375 and 1376, cited above, and decided that a provision like section 1374 relating to the *land* on which the improvement is made, gives the laborer a paramount lien only as against other liens and incumbrances created subsequent to the commencement of work on any contract for the erection of such building, structure or other improvement, and that those made *prior* to that time were unaffected by it. But the court goes on to say that a section of the Iowa Code like section 1376 of the Montana Code, made a different provision in regard to the lien on the building, erection and improvement on the land, and thus summed up the statutory law:

"The mechanic, therefore, has a lien upon the *land* paramount to all rights accruing after the commencement of his

work, and what he puts upon the land paramount to all other claims, whether created before or after that time. The decisions of the courts of Iowa are to this effect and the proposition is not disputed in argument here."

This was the view taken of the statutes in *Grand Opera House v. Maguire*, 14 Mont. 558, where Justice Harwood, speaking for the court, said:

"This provision (§ 1376) subjects the improvements to the claim of the lienor to secure payment for the labor or material used in the erection of the improvement, by right superior to that of the prior mortgagee." (See also *L. & M. Co. v. Mining Co.*, 15 Mont. 24 and *Murray v. Swanson*, 18 Mont. 533.)

The Montana statutes in thus giving a lien upon a building or improvement separate from the land in preference to all prior liens upon the land, and by permitting the enforcement of such a lien by sale and removal of the building or improvement, seem to wipe out the common law rule that buildings attached to the real estate are part of the real estate, not to be severed without permission of prior mortgagees of the land. Commenting upon such statutes Jones on Mechanic's liens, § 1373, says:

"A lien is given, not on the materials as such, but on the buildings or improvements in the construction of which the materials are used. The operation of the statute, in case there is a prior mortgage of the land, is to dis sever the improvements from the realty by giving a superior lien on such improvements, and conferring on the purchaser the right to remove them."

Now to apply these controlling rules. Plaintiff has not proved that he has erected a building or structure, or put any other improvement upon the mining claims susceptible of severance and removal. He relies solely upon the contention that, where the improvements are incapable of segregation, the lien is upon the mine itself, and is to be preferred to any prior lien, incumbrance or mortgage upon the land on which the buildings, structures or improvements are erected. But

we think plaintiff is in error in his construction of the statutes. Many improvements, buildings or erections placed upon mining claims may be removed from the land itself. There are mills, hoists, pumps, sheds and other improvements upon which labor may have been done. For all such improvements the liens of the laborers attach to the buildings or improvements in preference to any prior lien, incumbrance or mortgage, and they may be sold and removed. But where the improvement into which the materials or labor went cannot be removed from the land and sold, the statute in such case has not provided for any preference over a pre-existing mortgage, but rather by clear implication declared otherwise. (*Getchell v. Allen*, 34 Iowa 559.) It is impossible, for instance, to separate a shaft in a mine from the mining claim upon which it is sunk. The lien in such a case attaches to the land, and the law recognizes that the lienor derives the benefit of such improvement by the enhanced value of the property, but his lien is subsequent to a pre-existing mortgage. (*Montana L. & M. Co. v. Mining Co.*, 15 Mont. 24; *Alvora v. Hendrie*, 94 U. S. 545; *Conrad and Ewinger v. Starr*, 50 Iowa 470.)

Whether or not a lien for labor or materials furnished on a mining claim extends to the whole claim or only to that part of the realty upon which the improvement is made is not important in this case, because, conceding the truth of that proposition which is laid down in *Smith v. Sherman Mining Co.*, 12 Mont. 524, it does not follow at all that any such lien is to be preferred to the pre-existing lien of a judgment or mortgage.

In conclusion we think that the court correctly fixed the relation of the mortgage liens in the case by awarding them priority over the plaintiff's liens, and in this respect the judgment must be affirmed.

The legal question raised by Murray's appeal is whether or not the district court was correct in ordering that Murray take nothing of the action and that he have no lien on the property.

To the brief of Murray's counsel, and to the authorities

cited to the effect that the court did err in ruling adversely to Murray, no brief has been filed by either plaintiff or the mortgagee defendants. The mortgagees, however, (except the administrator of the estate of Mary Minuse) did file a brief, contending that Murray's position is adverse to the mortgagees, and that this court has no jurisdiction over the mortgagees' rights so far as they may be affected by any judgment of reversal of the district court's order, because no notice of appeal was ever served upon the mortgagees by appellant Murray. The facts are that when the case was tried in the district court Messrs. Durfee & Brown and Smith & Word appeared as counsel of record for all the defendants, and the names of Durfee & Brown appear as having subscribed every answer filed. Throughout the trial no effort was made by the mortgagees to exclude any evidence offered by appellant Murray. On the contrary, all the defendants being represented by the same counsel, their rights were evidently recognized and understood as between themselves, and were adverse only to the plaintiff—who claimed priority to them all. It was the plaintiff alone who objected to the evidence of Murray's judgment against Ullery, and it was plaintiff's objection only which the court passed upon when it sustained that objection. It was never assumed on the trial, nor does it appear to us under the pleadings or proceedings had, that there is any necessary conflict between the interests of the mortgagees and Murray, and we cannot assume that the counsel for the defendants took the position they did, except with due regard to the wishes and interests of their several clients.

When Murray appealed it was by the same counsel who had represented him and his co-defendants on the trial. One of the said counsel, Mr. Word, argued Murray's appeal to the supreme court. D. M. Durfee, Esq., another of defendants' counsel, argued the appeal in behalf of the mortgagee defendants before this court, and stated at the close of the arguments that he did not contest the appeal of Murray and did not wish to be understood as doing so for his clients. But Messrs. McConnell & McConnell, who first appear in the case

in this court and who alone are contesting Murray's appeal, state that they are employed by all the mortgagees (except the Minuse estate) to maintain the integrity of the judgment as to them against all parties thereto who seek to disturb it by appeal. The attitude of the several defendants, therefore, is this in the supreme court: The defendants all made a common and friendly fight against plaintiff in the district court. Some of them prevailed—one alone did not. Plaintiff, by his counsel, and the unsuccessful defendant by the same counsel who had appeared for all defendants, appeal. In the supreme court, in addition to the original counsel of defendants who resist plaintiff's appeal only and contend for Murray's rights against plaintiff alone, new counsel appear for the mortgagees. The original counsel still say there is no hostility of interests between any of their clients—the one appealing and those simply responding to plaintiff's appeal. But the additional counsel for the respondent defendants say to us there is a conflict of interests between defendants and object to the jurisdiction of this court. Now if this court is obliged to elect between these discordant contentions and to decide that it has no jurisdiction over the mortgagees so far as they are affected by Murray's appeal, it would do Murray's rights—if any he has—grave wrong and must needs do so too in the teeth of the statements of the original counsel of all the defendants, that they, the defendants, are not in conflict on this appeal between themselves. Obviously, the mortgagee defendants who are still represented by the same counsel who tried their case for them in the lower court, should not be heard to say in this appeal through the mouths of those attorneys familiar with their case from its inception that they were not and are not in a position adverse to their co-defendant appellant, yet to stultify themselves through other counsel by contending that there is a conflict. We would not listen to such a position if advanced by the original counsel and we regard it as none the less unsound because advanced by the learned counsel who now first appear for the mortgagees. Besides, to uphold the mortgagees as against Murray would necessarily impute to

their senior counsel inexcusable error or gross perfidy of their clients' interests. We decline to do this in the absence of a clear showing. Nor should a court tolerate such a shifting of attitudes. Where litigants recognize the equities of one another by uniting to resist the demands of a common enemy, and all are legally entitled to succeed¹, yet through error one is denied all rights and appeals, we will not sustain the one and dismiss the other merely because the district court erroneously excluded the latter from participating in the fruits of the victory which he helped to gain and which was awarded his co-defendants.

The circumstances of this case make it easily distinguishable from *Trader's Bank v. Boken*, 5 Wash. 777, cited by counsel for the mortgagees resisting Murray's claims. There it did not appear that all the parties defendant made a common defense in the court below, or that there was a common interest between them; nor were all the defendants before the supreme court by the same counsel who had represented them in the lower court. That decision is, therefore inapplicable. We believe we have jurisdiction and so hold.

Reverting to the rulings of the court, we think it was error to exclude the judgment roll in the case of *Murray v. Ullery* offered in evidence by Murray on the trial. The judgment roll in that case shows that the action was on a promissory note; that the complaint was filed; that summons was duly issued and properly served, and that after the statutory time for answering or pleading had elapsed the default of defendant was entered and judgment rendered for the plaintiff as prayed for in his complaint. The complaint lacked any verification and for this reason the district court rejected the evidence. The object of the verification of the complaint is to insure good faith in the averments of the plaintiff. (*Patterson v. Ely*, 19 Cal. 28.) The latest writer on Code Pleading, Phillips, § 224, says:

"With the view to secure good faith and truthfulness in pleading, to confine litigation to matters really in dispute, and to avoid frivolous and false issues, nearly all the codes require

pleadings of fact to be verified upon oath. By thus requiring parties to sustain their statements and denials by affidavits of their truthfulness, facts not believed to be true will seldom be alleged on the one hand, and alleged facts believed to be true will seldom be denied on the other hand, and the judicial controversy will thus be limited to such statements and denials as the parties are willing to swear to."

It is also held that the verification is not a part of the pleadings, strictly speaking, and is not necessary to vest jurisdiction. "Like any other formal matter, its absence is waived by a failure to object. And if its entire absence does not affect the jurisdiction, of course mere defects cannot." (Van Fleet's Collateral Attack, § 251. See also Baylies' Code Pleading, page 310; Phillips' Code Pleading, § 225; Bliss on Code Pleading, § 173.)

Maxwell on Code Pleading, page 563, says (as does § 80 of the Montana Code Civil Procedure, 1887) that jurisdiction attaches to the defendant when he is legally served with summons, regardless of the defects in the petition or verification, and that the omission of the verification "amounts to one of those irregularities which cannot be collaterally called into question." (See also Boone on Code Pleading, §§ 34 and 81.)

The Montana Code—§ 81 Code Civil Procedure, 1887; § 660 Code Civil Procedure, 1895—defines pleadings as "the formal allegations by the parties of their respective claims and defenses for the judgment of the court." It also specifies what the complaint must contain as its allegations; and although the complaint, when made up of such formal allegations, must be verified, the verification is not really a part of any formal allegation of a claim by a party for the judgment of the court. It is an oath of the good faith of the complainant in making his averments, but of itself does not tender an issue or add an allegation to the pleadings. Such we take it is the reason of the texts of the authors referred to, which commend themselves to us.

The district court sustained the plaintiff's objection to the admission in evidence on Murray's behalf of the judgment roll,

motion and affidavit for execution, the execution and sheriff's deed, on the further ground that it appeared from the papers introduced that Murray was not the owner of the judgment "at the time the motion for execution was made" etc. This appears to have been error. More than five years had elapsed from the date of the entry of the judgment. The execution was issued upon the motion and affidavit of Murray, and after personal notice to the original defendant John Ullery. The exact date of the filing of the motion and affidavit does not appear, but they were served on the 13th of April, 1893. These proceedings were had in accordance with section 349 of the Code Civil Procedure Compiled Statutes 1887, *and were not objected to by Ullery.* (*N. P. R. R. v. Bender*, 13 Mont. 432.) The execution issued in obedience to the order of the court, made April 29th, 1893. The plaintiff introduced an assignment of the judgment by Murray to Frank E. Corbett, dated May 20th, 1892. But in the transcript of the judgment docket, which appears to have been offered in evidence in the case, there is a recital of a reassignment of the judgment to Murray by Corbett, April 10th, 1893, prior to the issuance of the execution, which was May 1st, 1893. By this evidence it would appear, therefore, as if Murray were presumptively the owner of the judgment at the date of the execution.

But the question of ownership is a matter of no importance on this appeal, because the plaintiff, who alone raised that question on the trial, does not ask for its determination, and in his argument and brief relies on but the one specification of error, namely, the ruling of the court declaring plaintiff's lien inferior to the mortgagees'. We understand his position to be that if his lien is not good against the mortgagees he cannot insist that it be held prior to the judgment lien, hence the ownership of the judgment is immaterial to him.

If the judgment debtor had any reason to show why execution ought not to have issued against him, he had an opportunity to appear after he was served with a copy of the motion and the affidavit for execution. Can this plaintiff now take

advantage of any defect in the proceedings had upon the judgment obtained by Murray against Ullery except by a direct proceeding, or can the judgment defendant alone do so? (*Beebe v. U. S.*, 161 U. S. 104; *Edgerton v. Edgerton*, 12 Mont. 122.) It would seem that the proper way to issue an execution is in the name of the party in whose favor the judgment has been given, and, if this be true, the execution ought to have issued in the name of Murray under any circumstances. (§ 312 Code Civil Procedure Compiled Statutes 1887; *Collins v. Smith*, 75 Wis. 395; *Freeman on Executions*, § 21.)

If any of these propositions are correct—and no one has disputed any of them in argument or brief—it was no concern of this plaintiff who owned the judgment at the time the execution issued, for it was of course by the mandate of execution itself that the sheriff acted.

The judgment of the district court, so far as it affects Murray, must be reversed, and the cause is remanded to the district court with directions to grant a new trial to Murray, proceeding in accordance with the views expressed in this opinion. When the lien of Murray is ascertained in amount, the court should then make a decree establishing the status of his lien toward the liens of the mortgagees and fixing their respective relations toward one another. In other respects the judgment is affirmed.

PEMBERTON, C. J., concurs. DEWITT, J., not sitting.

STATE, RESPONDENT, v. GAWITH, APPELLANT.

[Submitted December 14, 1896. Decided December 21, 1896.]

CRIMINAL PRACTICE—Bill of Exceptions—Settlement—Notice.—The statute, (section 2171, Penal Code) requiring a notice of at least two days to the county attorney of the presentation of a bill of exceptions to the judge for settlement is mandatory, and where the record on appeal does not show affirmatively that such notice was given the bill of exceptions will not be considered. (*McKay v. Montana Union Ry. Co.*, 13 Mont. 15, cited.)

SAME—Record—Instructions.—Error of the court in refusing to instruct the jury to acquit the defendant for insufficiency of the evidence to warrant a conviction will not be considered where the record does not properly present the evidence for review.

SAME—New Trial—Designation of Grounds.—Under section 2194 of the penal code, providing in effect that a motion for a new trial, if error has been committed by the court in misdirecting the jury in a matter of law, or if the court has erred in the decision of any question of law arising during the course of the trial, or when the verdict is contrary to the law or evidence, must be made on a bill of exceptions, and the notice of motion must designate the grounds upon which the motion will be made,—alleged error in instructions will not be reviewed on appeal where the only ground designated is that the verdict is contrary to law and evidence. (*Froman v. Patterson*, 10 Mont. 107, cited.)

Appeal from Eleventh Judicial District, Flathead County.

CONVICTION for grand larceny. The defendant was tried before POMEROY, J. Affirmed.

Statement of the case by the justice delivering the opinion.

The defendant was convicted of grand larceny and sentenced to the penitentiary by the district court of Flathead county on February 12th, 1896. On February 17th, he gave his notice of intention to move for a new trial, upon the grounds, among others, that the court erred "in refusing to instruct or advise the jury to acquit," and "that the verdict in said cause is contrary to the law and evidence." The notice stated that the motion would be made upon a bill of exceptions, to be thereafter submitted to and settled by the court, and upon the files and records and minutes of said court. The notice of intention to move for a new trial was duly served upon the county attorney on February 17th, 1896. The record contains no proof of service upon the county attorney of the bill of exceptions, or of notice of the presentation of the bill of excep-

tions to the judge for settlement. On May 19th, 1896, Judge Pomeroy certified that the bill of exceptions was settled and allowed. On June 23d the motion for a new trial was overruled, and on August 22d defendant's counsel duly gave notice of appeal from the judgment and from the order denying defendant's motion for a new trial.

II. G. Swaney, John Bloor and C. B. Nolan, for Appellant.

Henri J. Haskell, Attorney General, for the State, Respondent.

HUNT, J.—At the outset of this case the state objects to the consideration by this court of the bill of exceptions embodied in the transcript, because it does not appear by the record that the appellant ever notified the county attorney that he would present a bill of exceptions to the judge for settlement.

The recitals and statements of record, by which of course we must determine whether the appellate power of this court is invoked, nowhere disclose that any notice of the presentation of a bill of exceptions to the judge for settlement was ever given to the county attorney; nor does it appear that the county attorney ever appeared to offer amendments for any purpose whatsoever connected with the settlement of any bill of exceptions, or in any manner knew of the existence of any such paper before appeal was taken, or that he waived the notice required by the statute.

The statute requiring a notice of at least two days to the county attorney of the presentation of the bill to the judge, is mandatory. Notice is indispensable, and it must appear on the face of the record that this step, necessary to give this court jurisdiction of the appeal, has been taken. The statute provides as one necessary way by which possible errors in the presentation of matter excepted to on the trial, and sought to be preserved for review by bill of exceptions, can be revised and made correct is by extending to the prosecuting officer an

opportunity to examine the defendant's proposed bill of exceptions, that he may offer amendments to the same. (*McKay v. Montana Union R. R.*, 13 Mont. 15.) To deny him this opportunity is to ignore the law, and that he has had this opportunity this court can only be advised by an affirmative showing by the record. This must be so, for the reason that, if the county attorney has had no notice of the bill of exceptions, he has had no chance to object thereto, and matter may thus have been incorporated in the bill, as settled by the judge, which had no proper place therein, and which would not have been allowed had the county attorney had the statutory opportunity to call the judge's attention to errors or defects in the proposed bill.

In *State v. Hinchey*, 5 Wash. 326, this exact question was raised, and the court said :

“ The respondent also moves the court to strike the bill of exceptions from the files on the ground that no notice of the settlement thereof was served upon the respondent as required by law. And as the record is silent as to notice, there is nothing before us to show that the court had jurisdiction to settle the same.”

The following cases are also in point, and hold that the record should show that the bill of exceptions was served, or notice of the presentation of the same for settlement must be given to the opposite party or his counsel. (*Snead v. Tietjen*, (Ariz.) 24 Pac. 324; *People v. Hill*, 78 Cal. 405; *Coleman v. Ransom*, 45 Ga. 316; *Arnett v. Russell*, 59 Ga. 666; *Ackerman, Executrix v. Neil, Receiver*, 70 Ga. 728; *Encyclopedia of Pleading and Practice*, Vol. 83, pages 444-446.)

The bill of exceptions which contains the evidence cannot therefore, be considered.

On the appeal from the judgment we cannot consider the alleged error of the court in refusing to instruct or advise the jury to acquit, for the reason that the ground of that motion was the insufficiency of the evidence to warrant a conviction. But as the evidence is not before us, as heretofore decided, we cannot review the same.

The defendant relies upon errors alleged to have been committed by the court in instructing the jury. Section 2194, of the Penal Code, provides that a motion for a new trial, if error has been committed by the court in misdirecting the jury in a matter of law, or if the court has erred in the decision of any question of law arising during the course of the trial, or when the verdict is contrary to the law or evidence, must be made upon a bill of exceptions, and the notice of motion must designate the grounds upon which the motion will be made. The ground designated in the notice of motion in the case before us, is that "the verdict is contrary to law and evidence." So far, therefore, as the motion pertains to the evidence, it must be disregarded at once, as the evidence is not before us.

The question remaining, therefore, resolves itself into this: Can this court review the instructions on an appeal from the judgment, or from an order denying a motion for a new trial, where the only designation of the ground upon which the motion for a new trial was made, is that "the verdict is contrary to law?" It would seem as if under any circumstances there should be a more specific designation of the ground relied on than we find in this case; (*State v. Black*, 15 Mont. 144;) but, assuming that by changes in the code since *State v. Black. supra*, was decided, the statutory words are now a sufficient designation upon which the court will review the question of whether "a verdict is contrary to law or evidence," still the appellant here is not in a position to have the instructions considered by the court, because under a notice of motion designating as grounds for a new trial that "the verdict is contrary to law and evidence," the statute does not mean to include the distinct and separate ground of motion enumerated in subdivision 5 of section 2192, which authorizes the court to grant a new trial "when the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial." In *Froman v. Patterson*, 10 Mont. 107, the court approvingly quoted from the opinion in *Bumagim v. Bradshaw*, 39 Cal.

24, where it was held that it was not enough to aver that the verdict was against law, and then offer to support the averment by showing that the verdict was not supported by the evidence and was for that reason against law, and said :

“If such a course of proceeding was tolerated, all the other specific grounds for new trial, enumerated in the statute, might, for the same reason, be condensed into the one ground that ‘the verdict is against law;’ for, in that general sense, it would be ‘against law,’ if there was any valid reason whatsoever for a new trial. But the statute, in authorizing a new trial on the ground that the verdict ‘is against law,’ evidently does not intend to include in that phrase all or any of the other several distinct and separate grounds of the motion, which are specified in the act.” (Hayne on New Trial and Appeal, § 99.)

It seems to us that to hold that the instructions may be reviewed on appeal under the sole designated ground that the verdict is contrary to law, would do entirely away with the distinct and separate ground upon which a new trial may be granted when the court has misdirected the jury in a matter of law. A verdict is against law, says Hayne on New Trial and Appeal, section 99, only “*where it can be seen that the verdict of the jury was against the instructions.*” (*Murray v. Heinze*, 17 Mont. 353.)

There being nothing left for review of which appellant complains, the judgment and order appealed from must be affirmed.

Affirmed.

PEMBERTON, C. J. and DE WITT, J, concur.

PRIEST, RESPONDENT, v. EIDE, ET AL., APPELLANTS.

[Submitted September 30, 1896. Decided December 21, 1896.]

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24	165

LAW OF THE CASE—Former Appeal—Validity of Bond.—The decision of this court on a former appeal that a bond which was in suit for reformation was valid without reformation when properly construed, was necessarily an adjudication as to the validity of the bond and is therefore the law of the case on a second trial to recover the amount due on the bond. (*Watson v. O'Neill*, 14 Mont. 197.)

INTEREST—Action on Bond.—Where a judgment for the defendant in a suit on a bond was reversed on appeal, the plaintiff, upon recovering a judgment on the second trial is not entitled to interest upon his claim from the date of the judgment rendered at the former trial, under section 1237, Fifth Division, Compiled Statutes, allowing interest in such cases after ascertaining the balance due, since the balance due was not ascertained until the verdict was rendered at the second trial.

APPEAL—Rehearing.—A motion for a rehearing will not be granted on a second appeal where the contention of the moving party, if sustained, would require a reversal of the decision on the former appeal.

Appeal from the First Judicial District, Lewis and Clarke County.

ACTION on bond. Judgment was rendered for the plaintiff below by BLAKE, J. Affirmed.

Statement of the case by the justice delivering the opinion.

This is a suit to reform a bond, and for judgment therefor, after reformation thereof has been decreed. This is the second appeal of the case. (See *Watson v. O'Neill et al.*, 14 Mont. 197.

When the case was here on the first appeal we held substantially that if the bond is construed in connection with the building contract and plans and specifications of the building mentioned in the complaint, as it should be, as all of said instruments were contemporaneous and parts of the same transaction, then there was no necessity for a reformation of the bond; and that the bond so construed was a valid instrument upon which the plaintiff was entitled to recover the amount sued for. We also held that under the foregoing view all the allegations in the complaint referring to a reformation of the bond were surplusage.

In the second trial of the case below the court ignored all the allegations of the complaint relating to the reformation of the bond, in accordance with the decision of this court, and treating that decision as the law of the case, entered judgment for the amount claimed by plaintiff. The defendants appeal from the judgment and order of the court denying a new trial.

Henry C. Smith, for Appellants.

F. C. Stranahan, for Respondent.

PEMBERTON, C. J.—We are clearly of the opinion that the action of the trial court in holding the decision of this court in *Watson v. O'Neill, et al.*, *supra*, to be the law of the case was correct. We do not see how the court could have done otherwise.

Counsel for the appellants contends that the question of the validity of the bond sued on was not before this court in *Watson v. O'Neill, et al.* We think this contention cannot be supported. We held that the bond which was in suit for reformation, and after reformation for judgment thereon, was valid without reformation when properly construed. We necessarily passed upon, and had to pass upon the validity of the bond.

The plaintiff also appeals from the refusal of the trial court to allow him interest on the demand from the date of the judgment rendered at the former trial of the case.

We think the view of the court was correct. The statute, section 1237, Fifth Division Compiled Statutes, 1887, allows interest in such cases as the one at bar after "ascertaining the balance due." The amount, or "balance due," was only ascertained when the verdict was rendered in favor of plaintiff at the second trial of the case.

The judgment and order appealed from are affirmed.

DEWITT, J., concurs. HUNT, J., disqualified.

ON MOTION FOR REHEARING.

PER CURIAM.—As stated in the opinion of the court, this is the second appeal of the case. In the first trial of the case the district court sustained a demurrer to the complaint. Thereupon plaintiffs dismissed the suit without prejudice and commenced another suit against the same defendants. On the trial, under the complaint in the new suit, the court non-suited plaintiffs. From this action plaintiffs appealed and this court reversed the judgment of the lower court and held that the defendants were all liable on the bond without its being reformed. The case went back for new trial and the district court followed the opinion of this court and judgment was accordingly rendered against the defendants for the amount of the bond.

The principal ground for rehearing is the contention of appellants that the plaintiff having failed to appeal from the order of the district court sustaining the defendants' demurrer to the complaint in the first suit on the ground that defendants were not liable on the bond, he is now estopped from litigating the matter and that this court has no jurisdiction to determine that matter in this appeal, and had no right so to do on the former appeal.

To uphold this contention would be to grant a rehearing of the former appeal and reverse the conclusion then reached by this court. This cannot be done, especially in view of the fact that a majority of the justices now composing this court were trial judges who had had to do with the case below, and who now deem themselves to be disqualified from passing upon the merits of this appeal, and only participate at all by consent of parties. We must under the circumstances overrule the petition for rehearing, believing the law of the case to have been settled.

SANFORD ET AL., RESPONDENTS, v. EDWARDS, APPELLANT.

[Submitted December 8, 1896. Decided December 21, 1896.]

SUMMONS—Service—Mandatory Statutes.—Statutes prescribing the manner of service of summons are mandatory and must be strictly pursued, and therefore, a statute providing for service of summons by reading it to the defendant personally, or by leaving a copy at his place of residence, is not satisfied by the delivery of a copy to the defendant personally, and a judgment rendered upon such service is void.

EVIDENCE—Service of Summons.—In an action in the district court on a judgment recovered in a justice court, parol evidence is inadmissible to show that the service of the summons in the justice court was made in conformity with the statute, for the purpose of authorizing a judgment in the district court.

Appeal from First Judicial District, Lewis and Clarke County.

ACTION on Judgment. Judgment was rendered for the plaintiffs below by BUCK, J. **Reversed.**

Statement of the case by the justice delivering the opinion.

It appears from the record and pleadings in this case that on March 4th, 1887, plaintiffs recovered judgment against the defendant before a justice of the peace for the sum of \$298.99 and costs. This is an action commenced in the district court to recover judgment on the judgment rendered before said justice of the peace.

The complaint in this case alleges that by mistake the name of the defendant in said justice's court was given as "Ada" Edwards instead of "Mary" Edwards, but that Mary Edwards was and is the real defendant in said action before said justice, and that summons in said justice's court was served upon Mary Edwards and judgment rendered against her as the real defendant in said cause before said justice.

The defendant filed a general demurrer to the complaint, which was overruled. The answer denies the indebtedness sued for in the justice's court; alleges defendant's real name is "Mary" and not "Ada" Edwards; that the summons

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issued in the case by the justice of the peace was directed to Ada Edwards as defendant, and that on the 28th day of February, 1887, the constable served a copy of said summons upon this defendant, but did not read the same to her.

The answer sets up the return of the constable which is as follows: "I hereby certify that I received the within summons on the 28th day of February, 1887, and personally served the same on the 28th day of February, Anno Domini 1887, upon Ada Edwards, being the defendant named in said summons, by delivering to said defendant personally in the said county of Lewis and Clarke, a copy of said summons." Defendant in her answer alleges that judgment was rendered in said justice's court against Ada Edwards on the 4th day of March, 1887, and that said judgment is null and void for the reason that said justice of the peace never acquired jurisdiction to render the same against the defendant; that this defendant never appeared in said justice's court and that judgment entered therein was by default against this defendant as "Ada Edwards."

The replication to the answer alleges that the constable served the summons upon the defendant by delivering a copy thereof to her at her place of residence in the county of Lewis and Clarke, state of Montana, and alleges on information and belief that it was delivered to her at her place of residence. Thereafter the defendant moved the court for judgment on the pleadings, which motion was overruled by the court.

The case was tried to the court without a jury. On the trial the constable, White, was introduced, and over the objection of the defendant was permitted to testify, and did testify, that he served the summons issued by the justice of the peace upon the defendant by delivering a copy of it to her at the front door of her residence. The defendant at the close of the plaintiff's testimony moved the court for a nonsuit, on the ground that the judgment sued on was void, which motion was overruled.

The court made certain findings of fact in favor of plaintiffs and rendered judgment as prayed for against the defendant.

This appeal is from the judgment and from an order refusing a new trial.

Henry C. Smith and *T. J. Walsh* for Appellant.

A summons in a justice court is required to be served by reading it to the defendant. (§ 744, Code of Civil Procedure, subd. 4.) "Where the statute provides the form of service or mode of obtaining it, that mode must be pursued strictly." (Brown on Jurisdiction of Courts, § 41, page 110.) Statutes prescribing the manner of service are mandatory. (Wells on Jurisdiction of Courts, § 97, page 83.) Accordingly it has been repeatedly held that where the statute required a copy to be delivered and the officer only *read* the summons to the defendant, the service is void. (*Robbins v. Clemmens*, 41 Ohio St. 285; *Campau v. Fairbanks*, 1 Mich. 152; *Newlove v. Woodward*, 9 Neb. 502; *Young v. Capen*, 7 Mich. 287; *Grand Tower v. Schirmer*, 64 Ill. 116; *McCoy v. Crawford*, 9 Tex. 353; *Hart v. Gray*, 3 Sumn. 339.) The particular manner of service required by the statute must appear from the record or a default judgment is void. (*Barney v. Vigoreaux*, 17 Pac. 433; *Maynard v. McCrellish*, 57 Cal. 355; *Naglee v. Spencer*, 60 Cal. 11; *Wilkinson v. Chilson*, 36 N. W. 836; *Mattison v. Smith*, 37 Wis. 333.) A judgment taken against "Ada" Edwards does not bind Mary Edwards. (*McGill v. Weil*, 10 N. Y. S. 246; *Gardner v. Kraft*, 52 How. Pr. 499.)

Massena Bullard, for Respondents.

PEMBERTON, C. J.—The first question presented by this appeal is as to whether the constable's service of the summons issued by the justice was void. If the service of the summons was void, then it will not be disputed that the judgment of the justice, on which this suit is brought, was and is void also, as well as all proceedings thereunder.

Section 744, Code of Civil Procedure, Compiled Statutes, 1887, in force at the time of the service of the summons in question, and which must govern in the determination of the

case, after prescribing the manner of service of summons on corporations, minors, persons of unsound mind, etc., in subdivision 4 provides for service of summons in cases like the one under discussion, as follows: "In all other cases, by *reading* the same to the defendant *personally*, or by leaving a copy at his place of residence." It is conceded that in this case the constable did not read the summons to the defendant *personally*.

In *Brown on Jurisdiction*, section 41, page 110, it is said: "When the statute provides the form of service or mode of obtaining it, that mode must be pursued strictly." Statutes prescribing the manner of service are mandatory, not directory. (Wells on Jurisdiction of Courts, § 97; Freeman on Judgments (4th Ed.) § 125.)

In *Robbins v. Clemmens*, 41 Ohio St. 285, under a statute requiring service to be made by delivering a copy, service was made by reading the summons to the defendant; the court held the service void, and that a judgment rendered on such service could be attacked collaterally.

In *Newlove v. Woodward*, 9 Neb. 502, the court held that "a summons must be served upon a defendant in the mode provided by the statute, in order to give the court jurisdiction, unless the defendant by an appearance waive the defect." To the same effect see *Campau v. Fairbanks*, 1 Mich. 152; *Young v. Capen*, 7 Mich. 287.

In *Grand Tower v. Schirmer*, 64 Ill. 116, the court says: "The officer making the service was bound to pursue the requirements of the statute. He is not invested with power to substitute another and different mode from that pointed out in the statute." See, also, *McCoy v. Crawford*, 9 Tex. 353; *Hart v. Gray*, 3 Sumn. 339; *Mattison v. Smith*, 37 Wis. 333.

In fact the authorities, if not absolutely uniform upon this question, seem to largely and strongly support the view that such service as we are here discussing is void, and that the judgment rendered thereon is necessarily void also. We, at least, have been shown no authority to the contrary by coun-

sel for respondent, nor has our attention in any manner been called to any such authority.

We are, therefore, of the opinion that the constable's service of the summons issued by the justice was void, and gave the justice no jurisdiction of the defendant.

The court permitted the constable to testify in this case that he served the summons issued by the justice upon the defendant by delivering a copy thereof to her personally at the door of her residence. This is assigned as error. We think the action of the court was erroneous. The constable might, we think, have amended his return to show service in compliance with the requirements of the statute—if the facts warranted such amendment—in the justice court, where the original proceedings and judgment were had and entered. But in this suit, commenced in the district court, we do not think it was permissible to prove or show the manner of service in the justice's court by parol testimony. This parol offer of evidence was not an offer or effort to amend a return to conform to the facts, so as to show service in conformity with the statute—if such amendment could have been made in the district court. It was an attempt in one case and court to show by parol evidence that such service of summons was had on a defendant in another case and court as would authorize such other court to render the judgment in controversy. We think the admission of parol evidence to establish such fact was error. (§ 77 Code of Civil Procedure, Compiled Statutes, 1887; *Settlemeier v. Sullivan*, 97 U. S. 444; *Botsford v. O'Connor*, 57 Ill. 78; *Wellington v. Gale*, 13 Mass. 483; *Miller v. Plue*, 64 N. W. 232; *Brown v. Gaston*, 1 Mont. 57; *Dyas v. Keaton*, 3 Mont. 495; *Sawyer v. Robertson*, 11 Mont. 416.)

We regard this question as settled by the great weight of authority in accordance with the foregoing view. If there are respectable authorities to the contrary, our attention has not been called to them.

Counsel for appellant concedes that the question of suing the defendant by a wrong christian name in the justice's

court is unimportant, and of itself would be unavailing on this appeal.

The judgment and order appealed from are reversed.

Reversed.

DE WITT, J., concurs. HUNT, J., disqualified.

PALMER, APPELLANT, v. THE CITY OF HELENA, ET
AL., RESPONDENTS.

19	61
24	537
19	61
25	582

[Submitted December 16, 1896. Decided December 21, 1896.]

MUNICIPAL CORPORATIONS—Constitutional Limit of Indebtedness—Issuance of Bonds.

—The funding by a city of an existing indebtedness by the issuance of bonds does not create a new or additional indebtedness within section 6, Article XIII of the Constitution, limiting the indebtedness which may be incurred by a city, but merely changes the form of the liability. (*Hotchkiss v. Marion*, 12 Mont. 218, followed.)

SAME—Same.—Where the assessment of a city for a given year is the basis for calculating the three per cent. indebtedness which the city may incur under the constitutional limitation, and the whole bonded indebtedness is less than three per cent. of the assessment for such year, outstanding warrants issued for indebtedness incurred under the assessment of that year may be lawfully funded by the issuance of bonds to an amount equal to the difference between the debt and three per cent. of the assessment.

SAME—Same—Constructing Sewerage System.—Section 6, Article XIII of the constitution and section 4800 of the Political Code, forbidding the creation by a city of an indebtedness greater than three per cent. of the assessed value of property within its limits, unless the creation thereof is necessary and authorized by a vote of the taxpayers, for the purpose of constructing a sewer or water system, prohibits the creation of an indebtedness beyond the three per cent. limit for such purposes by a city which had its sewerage system at the time of the adoption of the constitution.

Appeal from First Judicial District, Lewis and Clarke County.

INJUNCTION to restrain issuance and sale of city bonds. Judgment was rendered for defendants below by BLAKE, J. Reversed.

Statement of the case by the justice delivering the opinion.

The plaintiff and appellant is a resident and taxpayer of the city of Helena. The defendants are the city of Helena, the mayor, aldermen, treasurer and the city attorney of said city.

This action is prosecuted by the plaintiff as a taxpayer to restrain the defendant city and its officers from issuing, negotiating and selling certain bonds described in the complaint, which it is alleged that said city proposes to issue, negotiate and sell for the purpose of refunding certain other bonds denominated "sewer bonds," and for the purpose of funding a large amount of outstanding warrants heretofore issued by said city. It is alleged in the complaint that the indebtedness which would be created by issuing, negotiating and selling such bonds will be in excess of the limit prescribed by the provisions of Article XIII, section 6, of the State Constitution. The complaint alleges that on July 9th, 1895, a resolution was introduced in the city council of said city and passed to call an election to submit to the electors the question of declaring \$280,000 sewer bonds outside of the constitutional limitation; that in pursuance thereof an election was held and a majority of the electors of said city voted in favor of declaring the bonds outside of the constitutional limitation. It is also alleged that on the 13th day of August, 1895, the city council of said city passed a resolution to call an election for the purpose of submitting to the voters the question of issuing bonds to refund and fund the bonds and warrants mentioned in the complaint; that said election was held and a majority of the voters of the city voted in favor of the issuing of such bonds; that afterwards ordinances were passed by the city council of said city directing the bonds to be issued and sold to the highest bidder; that the city council of said city advertised for bids for the bonds, and on the 29th day of February, 1896, sold the bonds to one George F. Cope. The plaintiff alleges, in substance, that at the time of the passing of said resolutions and ordinances by the city council of said city, and the election held thereunder for the purposes already stated, the debt of said city, already incurred and existing, exceeded the amount of the indebtedness which the city was permitted to incur under the provisions of Article XIII, section 6, of the Constitution of the State; that the amount of warrants then outstanding, exclusive of interest, was \$366,-

\$111.35; that the amount of bonds outstanding at that date was \$391,500, making a total indebtedness of bonds and warrants, exclusive of interest, in the sum of \$760,311.35; that the assessed valuation of the city for the year 1895 was \$13,943,637; that the resolutions and ordinances passed by the city council of said city were absolutely null and void, because in violation of the provisions of the section of the constitution above referred to, and that the election held under and in pursuance of said resolutions and ordinances, were also ineffectual and void for the same reason.

The defendants in their answer claim that \$161,500 of the bonds mentioned in the complaint are bonds which the city is seeking to refund at a lower rate of interest than said bonds are now drawing, and claim that the city has power and authority to refund said bonds under section 4800, subdivision 64, of the Political Code; and claim also that the refunding of said bonds is not the creation of a new indebtedness. The defendants further contend that without reference to the question of the city's undertaking to place the sewer bonds outside of the ordinary three per cent. limit fixed by the constitution, the city is entitled to issue bonds to the amount of \$168,204 for any indebtedness that was existing on the 12th day of September, 1893, provided such indebtedness still remains unpaid. The defendants allege that on the 12th day of September, 1893, there were outstanding warrants, that still remain unpaid, to the amount of \$145,171. This is not disputed by the plaintiff. The defendants further allege, and which is not disputed by the plaintiff, that the assessment of the city of Helena for the year 1892, and which remained the basis for calculating the limit of indebtedness until September, 1893, was \$18,656,828, and that three per cent. of this amount is \$559,704, and that the city was, therefore, authorized to incur an indebtedness for ordinary purposes on the 12th day of September, 1893, to the amount of \$559,704, from which said sum, they claim, if the bonded indebtedness of \$391,500 is deducted, it will leave the sum of \$168,204, and for which last sum the city is authorized to issue its bonds for the pur-

pose of funding said debt without infringing upon said constitutional limitation. The defendants claim that in any event, and without infringing upon the constitutional provision invoked by the plaintiff in this case, the city of Helena may issue refunding bonds to the amount of \$161,500 to take up the old bonds, and \$168,204 for the purpose of funding the warrant indebtedness of the city, with the accrued interest due on said bonds and warrants. Defendants deny that the resolutions and ordinances of the city council of said city, and the elections held thereunder were ineffectual and void, and claim that the city had the right by such ordinances and elections to declare the \$280,000 sewer bonds outside of the three per cent. limitation of indebtedness prescribed by the constitutional provision mentioned and invoked by plaintiff.

The district court rendered judgment on the pleadings in favor of defendants, and dismissed plaintiff's complaint. From this judgment the plaintiff appeals.

Walsh & Newman, for Appellant.

Massena Bullard, for Respondents.

PEMBERTON, C. J.—The first question presented by this appeal is as to whether the issuing and sale of new bonds in the sum of \$161,500 by the city for the purpose of refunding a like amount of old bonds of the city, creates a new debt. The only objection urged by appellant to such proposed action by the city is that an additional debt will be created thereby.

This court, in *Hotchkiss v. Marion et al.* 12 Mont. 218, held that the funding of an existing indebtedness by the issuance of bonds did not create a new or additional indebtedness, but that the form of the liability of a county was only changed thereby. In that case this question is fully discussed, and, we think, the proper conclusion reached. We think that case is decisive of the question raised here.

The respondents contend that in any view of the case the city can issue bonds in the sum of \$168,204, for the purpose of funding a like amount of city warrants now outstanding.

It is conceded that the assessment of the city of Helena for the year 1892, and which remained the basis for calculating the amount of indebtedness the city might incur under the constitution until September, 1893, was \$18,656,828; that three per cent. of this is \$559,704; that the city was authorized to incur an indebtedness to that amount for ordinary purposes on September 12th, 1893; that if the whole bonded indebtedness of the city, to-wit: \$391,500 be deducted from said sum it would leave the sum of \$168,204, evidenced in this case by warrants, which the city could legally fund by issuing bonds therefor. It is also conceded that on the 12th day of September, 1893, there were outstanding warrants of the city—which still remain unpaid—to the amount of \$145,181.

Upon this showing and these concessions, we think the city may lawfully fund the warrants of the city by issuing its bonds to the amount of \$168,204, provided said warrants were issued for indebtedness incurred under the assessment of 1892, if warrants to that amount remain now unpaid. This is in accordance with the views expressed in *Hotchkiss v. Marion*, *supra*. These warrants remaining unpaid should be funded according to the date of their issue.

The important question that arises on this appeal is as to the authority of the city by ordinance and vote of the electors, at an election held under such ordinance, to take the sewer bonds mentioned in the pleadings, out of the three per cent. limit of indebtedness for ordinary expenses prescribed by the constitution, and place the indebtedness evidenced by such bonds, under the larger limit allowed by the constitution for sewer and water systems, and which larger limit is fixed by section 4800, in subdivision 64 thereof, Political Code, at ten per cent. of the assessed valuation of property, as the maximum amount of indebtedness the city can incur for such sewer and water systems, when the same shall be necessary to construct such system or systems, and after the same shall be authorized by vote of the people.

Section 6, Article XIII of the constitution reads as follows :

“No city, town, township or school district shall be allowed to become indebted in any manner or for any purpose to an amount including existing indebtedness, in the aggregate exceeding three per centum of the value of the taxable property therein, to be ascertained by the last assessment for the state and county taxes previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount by or on behalf of such city, town, township or school district shall be void: Provided, however, that the legislative assembly may extend the limit mentioned in this section, by authorizing municipal corporations to submit the question to a vote of the tax-payers affected thereby, when such increase is necessary to construct a sewerage system or to procure a supply of water for such municipality which shall own and control said water supply and devote the revenues derived therefrom to the payment of the debt.”

That part of subdivision 64, section 4800 of the Political Code, pertinent to this question, is as follows:

“That an additional indebtedness may be incurred, when necessary, to construct a sewerage system. * * * The additional indebtedness authorized, including all indebtedness heretofore contracted, which is unpaid or outstanding, for the construction of a sewerage system, shall not exceed ten per centum over and above the three per centum heretofore referred to of the total assessed valuation of the taxable property of the city, as ascertained by the last assessment for state and county taxes; and provided further, that the above limit of ten per centum shall not be extended unless the question shall have been submitted to a vote of the taxpayers affected thereby and carried in the affirmative by a vote of a majority of said taxpayers who vote at such election.”

It will be observed that the section of the code quoted above is in harmony with the constitutional provision involved. The creation of an indebtedness greater than three per cent. of the assessed value of property within the limits is absolutely forbidden to the city by the constitution and the statute, unless the creation thereof is *necessary*, and is authorized by a vote

of the electors, for the purpose of constructing a sewer or water system. It is conceded that at the time the ordinance ordering an election was passed by the city, and when the election was held thereunder to declare the sewer bonds out of the three per cent. limit and into the ten per cent. limit, allowed by law for sewer and water systems, that the city of Helena had already constructed her sewer system. In fact her sewer system was constructed prior to the adoption of the constitution and the enactment of the provision of the code thereunder. The bonds in question were issued under laws passed by the territorial legislature. These laws and the validity of the bonds are not questioned. The defendants contend that, as cities which had no sewer systems when the constitution was adopted, might take advantage and get the benefit of its provisions by declaring its sewer bonds out of the three per cent. limit fixed by the constitution for ordinary expenses, by proceeding in the manner that the city of Helena has undertaken to proceed, it would be a manifest injustice to deny to cities that had a sewer system before the adoption of the constitution, the right to so place, distribute and dispose of their indebtedness. But under the constitution and the statutes enacted thereunder, before any city can create a debt in excess of three per cent. of the value of the taxable property therein, it must be *necessary* to do so for the purpose of constructing a "sewerage system or to secure a supply of water for such municipality."

Was it *necessary* in order to secure a sewerage system or supply of water for the city by ordinance and vote of the people to take these sewer bonds out of the three per cent. limit and place them in the ten per cent. limit, at the time the attempt to do so was made as shown in the statement? We think not. It could not be *necessary*, for the city had its sewer system at the time. Suppose, as suggested by counsel for appellant in the argument of the case, that a city which had constructed its sewer system since the adoption of the constitution, and had paid for it out of its general fund, should undertake to vote and place the amount of the cost of its con-

struction out of the three per per cent. limit and into the ten per cent. limit permitted under circumstances shown above, would it be contended that such action would be warranted, either by the constitution or provision of the code cited above? We think not. There would clearly, in such case, be no necessity that would authorize such action. The constitution, we think, is prospective in its terms and purposes. If this view acts harshly upon the city of Helena in this instance, we cannot help it, however much we may regret it. We must construe the constitution and laws as we find them. We have no power or disposition to legislate in this matter. We have so far contended for and held to a strict construction of the fundamental law of the state. We believe it to be right, and for the best interest of the people to strictly construe the constitution. We cannot consent to such a loose and liberal construction of that sacred instrument as shall in effect abrogate its provisions and thereby endanger the guarantees of life, liberty and property which the framers thereof sought to secure to the people. (*State v. Rotwitt*, 15 Mont. 29; *State v. Tooker*, 15 Mont. 8; *State v. Mitchell*, 17 Mont. 67; *State v. Camp Sing*, 18 Mont. 128.) In *State v. Camp Sing*, we said :

“And in the matter before us it is better that we suffer all the inconveniences of a present loss of revenue than that we let go of the constitution for the sake of relief from temporary distresses. The argument of *ab inconvenienti* must be excluded from all control over the decision.” The provisions of the constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise. (§ 29, Article III of the Constitution.)

We are, therefore, of the opinion that the city cannot now place the sewer bonds involved in the ten per cent. limit as it has sought to do, and that its attempt to do so is void.

The cause is remanded to the district court with instructions to enter judgment in accordance with the views herein expressed. Remittitur forthwith.

DE WITT and HUNT, JJ., concur

WILSON, ET AL., RESPONDENTS, v. HARRIS ET AL., AP-
PELLANTS.

[Submitted December 7, 1896. Decided January 2, 1897.]

APPEAL.—*Divided Court.*—On appeal a divided court affirms the judgment.

Appeal from First Judicial District, Lewis and Clarke County.

CREDITOR'S bill to set aside an assignment for benefit of creditors. Judgment was rendered for the plaintiffs below by BUCK, J. Affirmed.

Thomas C. Bach and H. G. McIntire, for Appellants.

McConnell, Clayberg & Gunn, for Respondents.

PER CURIAM.—The case was argued on December 7th, 1896, before Mr. Chief Justice Pemberton and Mr. Justice De Witt, Mr. Justice Hunt deeming himself disqualified. From that day until now—January 2d, 1897—the case has had the earnest consideration of the justices who heard it. There are several important questions of law in the case, but the greatest difficulty arises in the interpretation and construction of the facts and the application of the law thereto. Upon some of the questions involved we are wholly in accord; for example as to finding V by the court; while the finding does not so state, it suggests a participation by H. L. Frank in some fraud in a sale by the assignee to him. It is expressly found that the assignee acted in good faith, and we do not think that the facts as presented to us warrant any different conclusion as to Frank. There are also other matters in which we agree, some of which are material and others of which are unimportant; but there are other questions which are material and necessary to the affirmance or reversal of the judgment upon which we do not agree, and upon which, after three weeks consid-

eration, we find that we are not at all able to agree. The personnel of this court changes on day after to-morrow. At that time there will be two justices who will be disqualified to sit upon a re-argument, if one were ordered. The case could therefore not be heard at all after to-day. These circumstances, therefore, compel a decision to be made to-day and must result in an affirmance of the judgment and order appealed from on account of the disagreement of the justices who heard the case, which is accordingly done.

19	70
21	508
19	70
23	68

SLOAN ET AL., APPELLANTS, v. GLANCY, RESPONDENT.

[Submitted November 17, 1896. Decided January 2, 1897.]

WATER RIGHTS—Deeds—Appurtenances.—A conveyance of land, with the appurtenances, conveys the grantor's interest in a ditch passing through the land which had been constructed under an agreement with the owner of the water right, without proceedings in eminent domain, whereby he should be permitted to construct the ditch without payment of damages in consideration of the use by the grantor of sufficient of the water to irrigate his land below the ditch, and which was necessary to its cultivation, although such right to the use of the water was not described in express terms in the deed. (*Tucker v. Jones*, 8 Mont. 225; *Sweetland v. Olsen*, 11 Mont. 27, followed.)

SAME—Abandonment.—In the absence of evidence of an intention to relinquish, the mere non-user of a water right is not an abandonment. (*Smith v. Hope Mining Co.*, 18 Mont. 432, followed.)

APPEAL—Findings.—Omission of the court to make findings upon an immaterial issue is not an error of which the appellants can complain where the evidence on the issue was meager and the court offered to permit them to introduce further testimony upon the point before adopting the findings of the jury, which offer was refused.

Appeal from Tenth Judicial District, Fergus County.

INJUNCTION to restrain diversion of water. Decree for defendant was entered by DU BOSE, J. Affirmed.

Statement of the case by the justice delivering the opinion.

Suit by plaintiffs against the defendant to enjoin him from interfering with the plaintiffs' use and enjoyment of the waters of an irrigating ditch described in the complaint and situated in Fergus county. The plaintiffs have been in possession of

certain agricultural lands in Fergus county for years prior to the commencement of this suit. In 1884 the plaintiff Culnan and one Howell, the grantors of plaintiffs B. McDonnell and T. McDonnell, appropriated a thousand inches of the waters of Big Spring Creek. The plaintiffs allege that this appropriation was by means of a ditch which tapped Big Spring Creek, and that the plaintiffs B. and T. McDonnell, as grantees of Howell, now own said Howell's interest in said ditch and water. It is next alleged that about May 31, 1890, the plaintiffs Sloan, Culnan, Clegg, E. McDonnell, B. McDonnell and T. McDonnell appropriated an additional fifteen hundred inches of the waters of said stream by means of enlarging the ditch first above described, and that plaintiffs have used the waters flowing through the above mentioned ditch until interfered with by the defendant; that about August, 1892, and since then defendant has deprived the plaintiffs of the use of the waters aforesaid and caused them injury and damage.

The defendant denied that Sloan, one of the plaintiffs, was one of the original appropriators of the water first mentioned in the complaint, or that Howell was the grantor of plaintiff Ed McDonnell, or that Ed McDonnell has any interest in the said ditch as grantee of Howell. He also denied the alleged appropriation of May 31, 1890, of an additional fifteen hundred inches of water; denied the capacity of the ditch constructed to be sufficient to convey twenty-five hundred inches of water, or any greater amount than one thousand inches; denied any wrongful diversion on his part or any damage through any action of his to the plaintiffs or any of them. The defendant affirmatively set forth that he and his grantors owned a certain piece of agricultural ground adjacent to Big Spring Creek, and that fifty acres of his lands lie upon the northerly side of the creek between the creek and the ditch of plaintiffs and below the ditch; that the plaintiffs Culnan, Clegg and McDonnell; together with John W. Howell appropriated certain waters of Big Spring Creek by means of that certain ditch described in the complaint; that at the time

of such diversion and appropriation one Joel A. Harris, defendant's grantor, owned and was in possession of the ground now owned by defendant; that the plaintiffs' said ditch is constructed across the lands owned by this defendant and formerly owned by said Harris; that at the time of the appropriation of the water in 1884, and before the construction of the ditch by plaintiffs across the lands of the defendant, and in consideration of their being allowed to construct and maintain the said ditch across the said lands, the plaintiffs Culnan, Clegg and Ed McDonnell and Howell, the grantor of said plaintiffs B. and T. McDonnell, agreed with said Harris, defendant's grantor, that Harris should have such an interest in the said ditch and the waters therein as might be necessary to irrigate that portion of defendant's lands lying between the said ditch and the said Big Spring Creek—about 50 acres more or less;—that in pursuance of said agreement the said plaintiffs and the said Howell entered upon the construction, and completed the said ditch over and across the said lands of this defendant; that afterwards, in 1886, the defendant bought from the said Harris all his right, title and interest in and to the above mentioned lands, together with the appurtenances, and the same were conveyed to the defendant by deed in writing. The defendant alleges that at the time of the purchase the plaintiffs Culnan, Clegg, Ed McDonnell and Howell promised to convey to the defendant such interest in the ditch and the right to the use in the waters therein as might be necessary to irrigate the 50 acres of ground before mentioned; that in 1887, the defendant took possession of the lands so purchased by him and commenced to use the waters in the ditch, and has used the same every year since, and for more than five years has been in quiet and peaceable possession of as much of the water as was necessary to successfully irrigate his 50 acres of ground. Defendant prayed for a decree adjudging him to be entitled to the use of 75 inches of water flowing in the plaintiffs' said ditch, and that plaintiff be enjoined from interfering with his right to the use of the same.

The replication denied all the new matter set up in the an-

swer. Special issues were submitted to the jury. The jury found that Culnan and Howell appropriated certain of the waters of Big Spring Creek in 1884, but that the appropriation did not amount to one thousand inches. It was also found that the plaintiffs, in May, 1890, made an additional appropriation by enlargement of the original ditch of Culnan and Howell, but that this appropriation did not amount to fifteen hundred inches. They found that defendant diverted the water from the plaintiffs' ditch in August, 1892, and thereafter, but that there were no damages done. In answer to the question submitted whether Culnan, Clegg, Ed McDonnell and Howell made an agreement with Harris in 1884, by the terms of which agreement Harris permitted the above named parties to construct a ditch across the land of Harris in consideration that Harris should have the use of sufficient water to irrigate the land below the ditch, the jury replied "Yes," that there was such an agreement made with Thomas Culnan under which Harris was entitled to $37\frac{1}{4}$ inches of water. They found against the defendant upon the issue of adverse possession.

Thereafter the court adopted the findings of the jury, after modifying the one relating to the diversion by the defendant, so that the finding was to the effect that the defendant did divert the water, but did not wrongfully divert it.

A decree was entered in favor of the defendant adjudging him the owner of a sufficient interest in the plaintiffs' ditch to convey $37\frac{1}{4}$ inches of water from the point where the water is diverted from Big Spring Creek down to the point where the defendant diverts the same upon his lands. The plaintiffs moved for a new trial upon the ground that the evidence was insufficient to sustain the findings and decision of the court, and upon errors of law. The motion for a new trial was overruled, and from the order overruling the said motion and from the judgment the plaintiffs appeal.

William M. Blackford and *F. A. Stranahan*, for Appellants.

Von Tobel & Cheadle, for Respondent.

HUNT, J.—We will not encumber this opinion with a lengthy statement of the testimony in the case. A brief recital of the evidence upon which the district court and the jury founded their conclusions is sufficient.

From 1883 to 1886 Joel A. Harris owned a tract of land, afterwards sold to this defendant. In 1883 J. W. Howell built a small ditch across Harris' land to irrigate his own garden. In 1884 Thomas Culnan, J. T. Clegg and E. McDonnell proposed to build another ditch across Harris' land above, but parallel to, the original Howell ditch. About the time that Culnan, Clegg and McDonnell commenced their proposed ditch, Harris went to them, and speaking particularly to Culnan, McDonnell and Howell, objected to their taking out another ditch. Harris told them there was another ditch below and they ought to unite on the one ditch and not cut his place up. Culnan explained to Harris that there had been some disagreement between Howell and themselves concerning the rights in the other ditch, to which Harris replied that he was not going to have his ranch cut up by ditches because of a squabble among themselves. After some further conversation Harris told them that if they wished to construct a ditch through his land he wished what water he needed for the land below the ditch and that would be all the damages he would ask. They agreed upon this. The appellants now contend that Harris' statement had relation only to the ditch which Culnan, Clegg and McDonnell were commencing to dig; but the court and jury believed that the point of Harris' objections was to digging two ditches through his land, and that when he referred to uniting upon one ditch he referred to an enlargement of the Howell ditch—the one from which he could divert the water to his land. It certainly appears that the advice of Harris was acted upon, for the ditch constructed was the old Howell ditch, and it was through the same that water was conducted by the plaintiffs thereafter. In 1886, before and after defendant purchased of Harris, certain wit-

nesses conversed with several of the men who had constructed the enlarged Culnan-Howell ditch, and who owned interests therein. These persons admitted that the purchaser of Harris' land was entitled to irrigate his land lying below the ditch by water from the ditch, thus recognizing the agreement which had been made with Harris, the grantor of defendant Glancy. When it was suggested to several of the owners that the purchaser would like a title by deed in writing, they said that they had nothing to show themselves and could not therefore give any title other than the right to go on and use the water as the purchaser might desire as the water, under the agreement with Harris, went with the ranch to irrigate whatever land was below the ditch. The defendant Glancy testified that two of the persons interested in the ditch had offered him \$75 to relinquish his right to the same, and that another of the plaintiffs had told him, when there was some difficulty about the water in 1887, that when they had put the ditch through Harris' ground, they had agreed to give to Harris the necessary water to irrigate what land lay below the ditch as a consideration for the right of way through his premises.

Without further recapitulating the testimony, we think the findings are fully sustained by the evidence and that it appears the ditch now in use, and concerning which this action arose, is the identical one which was constructed as the result of the agreement between Harris and the plaintiffs, and that frequently after its construction, at divers times and to different persons, plaintiffs recognized the right of Harris, and permitted Glancy to purchase the land of Harris fully knowing of the agreement that had been made between themselves and Harris.

Appellants stand in one of two positions. If they enlarged the Howel ditch without Harris' consent, upon their own showing they were trespassers without legal right to maintain their ditch at all. Hence they would have no standing in a court of equity seeking to enjoin the right of the use of any waters by the person who owned the lands over which they

had unlawfully constructed their ditch. (*Emerson v. Eldorado Ditch Co.*, 18 Mont. 247.)

On the other hand, if they built the ditch with Harris' consent, such authority was clearly only obtained in consideration of the right of Harris to use enough water to irrigate those portions of his land lying below the ditch; therefore Harris' rights as well as plaintiffs', should be protected. The construction and use of the Howel ditch by the appellants tend to sustain the existence of the agreement as contended for by respondent, and to prove that it was in pursuance of that agreement and in consideration thereof that the plaintiffs were enjoying their rights, without having first proceeded in eminent domain. The admissions of the plaintiffs also strengthen this deduction.

The facts, like those in *Flickinger v. Shaw*, 87 Cal. 126, invest the whole transaction with the character of a purchase and sale. The plaintiffs bought and Harris sold a right of way for a valuable consideration, and because of the relations of the parties the case is at once distinguished from that of *Fabian v. Collins*, 3 Mont. 215, where the legal relations of the parties were likened to those existing between a landlord and tenant, and where the privilege to use water under a license was held to be one limited strictly to the original parties not to be sold and transferred by the original licensees.

Harris' right to the use of the water to irrigate his land being established, he had a right to convey the same to respondent Glancy, and the conveyance to Glancy of the land with its appurtenances also conveyed Harris' interest in the ditch and water right, which was necessary to the cultivation, use and enjoyment of the land, just as fully as if Harris had described it in express terms in the deed itself. This is the established law of this state and is decisive of respondent's rights. (*Tucker v. Jones*, 8 Mont. 225; *Sweetland v. Olson*, 11 Mont. 27.)

It is argued that because the evidence fails to show an actual use of the water for two years by Harris before he sold to Glancy, his right of use or his interest in the ditch and water

right did not become an appurtenant. No abandonment was relied upon; nor was it pretended that Harris intended to relinquish his rights at any time after he became possessed of them. On the contrary, he sold his lands to Glancy for a valuable consideration, and that water was necessary to the successful cultivation of the lands is a conceded fact. Mere non-user of a water right is not an abandonment. The Montana decisions upon that point are collated in *Smith v. Hope Mining Co.*, 18 Mont. 432.

There is nothing in the facts of the case to remove it from within the general rule that the water was a necessary appurtenance of the principal estate, and that in conveying the latter, as a matter of law and fact, the former was conveyed.

Appellants object to the omission of the court to make findings upon the amount of the respective appropriations in the years 1884 and 1890 of the waters of Big Spring Creek flowing through appellants' ditch. This issue became an immaterial one to the main controversy, for no rights of priority between appellants and respondent were involved. The evidence was so meagre upon the extent of the exact appropriations that the court and jury evidently found difficulty in making a specific finding. However, the privilege was accorded plaintiffs of introducing further testimony upon the point before the court adopted the findings of the jury, but the offer was declined. Under these circumstances plaintiffs cannot complain.

None of the other errors assigned are well taken. Judgment and order affirmed.

Affirmed.

PEMBERTON, C. J., concurs. DE WITT, J., not sitting.

MCDONALD, APPELLANT, v. LANNEN ET AL.,
RESPONDENTS.

[Submitted January 12, 1897. Decided January 18, 1897.]

Water Right—Date and amount of appropriation—Oral transfer—Review of evidence.

WATER RIGHT.—Date of Appropriation.—Where the evidence justifies the finding of the court fixing the relative priorities of the appropriations of water, appellant is not injured because the court arbitrarily fixes particular dates of the appropriations of the several parties, the date being merely incidental to the question of priority.

SAME—Amount of Appropriation.—T who owned land on both sides of a creek, constructed a ditch on the north side of the stream, by means of which he could irrigate only forty acres of land on that side, although the capacity of the ditch was greater than the amount of the water necessary for that purpose; subsequently and after other appropriations had attached, it was found to be necessary to construct another ditch to reach the land on the south side of the stream. *Held*, that, as to subsequent appropriators, T's appropriation was not limited to the amount necessary to irrigate the forty acres; and that T was entitled to a priority to an amount equal to the capacity of his original ditch.

SAME—Oral Conveyance of Water Rights.—In 1869 P settled on unsurveyed public lands (a squatter's right) and made an appropriation of water to be used thereon; by *mesne* oral transfers, B obtained possession of the land and G traded ranches with B's widow, and subsequently filed upon it as a homestead. *Held*, that a squatter's right can be transferred verbally; that the water right was an appurtenant to the land; that the oral transfer did not constitute an abandonment of the water right and that consequently the date of appropriation of G's right was properly fixed as of 1869. (*Barkley v. Tieleke*, 2 Mont. 59, distinguished.)

SAME—Finding of the Court.—Where the only evidence in the record shows that the amount of P's appropriation was from 50 to 60 inches, a finding fixing the amount at 150 inches is not sustained by the evidence.

Appeal from District Court, Granite County; Theo. Brantly, Judge.

ACTION by Angus A. McDonald against Edward Lannen and others to determine the priorities between water rights. There was a judgment for defendants, and plaintiff appeals. Modified.

Statement of the case by the justice delivering the opinion.

This action was commenced on the 7th day of November, 1893, under Sec. 1260, p. 997, 5th Div. Compiled Statutes Mont., for the purpose of determining the respective prior-

ities of the plaintiff and the defendants, who were claimants of the use of the waters of Willow creek, in the county of Granite, State of Montana, and was tried by the court sitting without a jury. The plaintiff appeals from the decree, and claims that the Court committed errors of law in admitting testimony, and that certain findings of fact are not supported by the evidence.

Durfee and Brown, for Appellant.

An appropriation of water dates from the commencement of work to utilize it for a useful purpose, if the work is prosecuted with reasonable diligence and in good faith. *Kelly v. Natoma Water Co.*, 6 Cal. 108; *Maeris v. Bichnell*, 7 Cal. 263; *Kimball v. Deerhardt*, 12 Cal. 45; *James v. Williams*, 31 Cal. 214; *N. C. & S. C. Co. v. Kidd*, 37 Cal. 310; *Osgood v. Water & Mining Co.*, 56 Cal. 574; *Sieber v. Frink, et al.*, 7 Col. 148; *Colorado Land & Water Co. v. Rock Fork, etc., Co.*, 3 Col., Ct. of Ap. 545; *Wells v. Mantle*, 99 Cal. 586; *DeNecochea v. Curtis*, 80 Cal. 399.

If, as we contend, the undisputed evidence shows that the plaintiff appropriated the waters of Willow creek from the fall of 1870, there is absolutely nothing in the evidence to show that the plaintiff ever abandoned his right from that time until the completion of his ditch in the spring of 1871. The court will take judicial notice of the climatic conditions of the country through which this ditch is constructed. (*Estill v. Irvine*, 10 Mont. 513.)

It follows, therefore, that the commencement of the work in the fall of 1870 and the completion of the same early in the spring of 1871 was a prosecution of the work with reasonable diligence. (Pomeroy on Riparian Rights, § 89; *Woolman v. Garringer*, 1 Mont. 535; *Atchison v. Peterson, Id.*, 561.)

We submit that the testimony did not warrant the court in finding that the plaintiff's right dated from the 15th day of May, 1871, but dated not later than the 1st day of September, 1870.

That the verbal sale of a water right operates as an aband-

onment is settled by a long list of authorities. (*Smith v. O' Hara*, 43 Cal. 375; *Barkley v. Tieleke*, 2 Mont. 59; *Kinney on Irrigation*, § 253, p. 407; *Pomeroy's Riparian Rights*, § 89, p. 143.)

It is a well settled rule that in determining priorities between contesting claimants for water that an important element for the court to consider is the need of the appropriator at the time of the appropriation, and that no one is entitled to have a priority adjudged for more water than he actually appropriated at the inception of his right, and that proof of present necessities is no criterion of the original appropriation. (*Nichols v. McIntosh*, 19 Col. 22; *Combs v. Agricultural Ditch Co.*, 17 Col. 151; *Fort Morgan L. & C. Co. v. South Platte D. C.*, 18 Col. 1.)

Rodgers and Rodgers, for Respondents.

One of the important questions suggested by appellant, is whether or not a verbal sale of land and the water right appurtenant thereto accompanied by a delivery of the possession thereof to the vendee, operates as an abandonment of the water right by the vendor, so that the vendee's right dates from the sale only, or does the vendee take the right of the vendor unprejudiced?

We maintain that the vendee takes the same right that the vendor had and his right to the water dates from the vendor's appropriation.

It will not be denied that so far as the land is concerned the grantee takes a good title against all the world except the United States; for a person not in privity with the original grantee can have no right to avoid the sale on the ground that a formal deed was not executed, and the original grantor is estopped from asserting any rights, because the contract is an executed one, the consideration paid, and the grantee is in possession. Furthermore the open possession of the land by the vendee is notice to the world of his ownership of such lands. *Storey v. Black*, 5 Mont. 26; *Jones v. Marks*, 47 Cal. 242.

If by such sale the vendee obtains a good title to the land, by what course of reasoning can it be said that he fails to take title to all the appurtenances of said land. An executed contract which passes the equitable title to a ditch to which there is appurtenant a water right insures to the grantee such water right as against an adverse claimant. (*Ortman v. Dixon*, 13 Cal. 34.)

The question of abandonment of a water right is also a question of intent. (*Dodge v. Marden*, 7 Oregon 457; *Middle Creek Ditch Co. v. Henry*, 15 Mont. 558, 39 Pac. 1054.) The true rule is that the appropriator is entitled to so much of the waters of the stream as was necessary to irrigate the lands owned by him at the date of his appropriation and which were available for the production of crops. (*Kleinschmidt v. Greiser*, 14 Mont. 484, 37 Pac. 5.)

BUCK, J.—Appellant (plaintiff in the lower court) complains that the trial court was not justified by the evidence in finding May 15, 1871, to be the date of his appropriation of water. Appellant testified that he had commenced to dig his appropriation ditches in the fall of 1870, and that he completed them in the spring of 1871. A witness called in his behalf testified that the said ditches had been “taken out” in 1871, “early in the spring, April or May,” he was not sure which; that he (witness) had assisted in the construction of one of these ditches in the spring of 1871; and that at the time this ditch was the only one he had seen on the place. Another witness testified that appellant had no ditches on his land in 1872. A statutory declaration of water right, made and filed under oath, by appellant in 1885 (introduced in evidence), recited that appellant’s appropriation of water from Willow creek had been made in the month of May, 1871. There was before the court also testimony in behalf of several other appropriators who claimed rights prior to appellants. The court found these latter rights antedated appellant’s; and while, from the testimony, it was impossible to determine the exact date of any one of them, established the dates as of May 1,

1871. There being evidence to support the lower court in deciding the relative priorities aforesaid, we are of opinion that appellant was not injured by the establishing of these dates as of May 1, 1871, and his own as of May 15, 1871. In water right suits testimony relating to original appropriations, some of them made many years before the controversy arises, is very often indefinite as to dates, and when this condition arises at the end of the suit the trial court, for the purpose of framing a decree specifically settling the respective rights of parties, of necessity must often arbitrarily fix a particular day or days for appropriations of water. Therefore, while the selection of these specific days of May 1st and May 15th was, in a sense, arbitrary, it being incidental merely to the determination of the question of priority, the action of the court was proper.

Appellant claims again that the court erred in finding that one Thomas was entitled to 150 inches of the waters of Willow creek as of May 1, 1871. As to the alleged error in the matter of finding the particular day of the appropriation, the previous reasoning applies. While conceding that there is some testimony to support the finding as to the amount of water, appellant urges that the first of the Thomas appropriation ditches constructed was only used to reclaim land on the north side of the creek, and, regardless of the question of its capacity, had no more than 40 acres of land subject to its irrigation; and that it was found necessary to construct another ditch to reach that portion of the ranch on the south side of the creek. The test of the extent of an appropriation with reference to a subsequent right to the waters of a stream is dependent upon the capacity of the first ditch before such subsequent appropriation is made. When an owner or possessor of land makes an appropriation of water in excess of the needs of the particular portion of the land upon which he conveys the water, and other portions of his land also require irrigation, his water right is not limited by the requirements of the particular fraction. He may still, despite the fact that another's water right has attached, construct other ditches

through his remaining land, provided that the total amount of water conveyed by all the ditches on his place does not exceed the original capacity of the first ditch. As between his appropriation and the subsequent water right, the capacity of the ditch by means of which he first made his appropriation is the test of the extent of it. There was no error, therefore, in the amount of the water awarded to Thomas.

The court found that the estate of John Gird, deceased, was entitled to 150 inches of the waters of Willow creek as of May 1, 1871. The testimony discloses these facts: The first appropriation of water on the 160-acre Gird ranch was made by one John Pickens, who settled upon it some time in 1869. Pickens sold the land to one Fahey some time later, who, after taking possession, subsequently sold and turned it over to one Patrick, to whose possession one Bradburn succeeded as a purchaser. Gird acquired possession of the land in 1884 by trading ranches with the widow of Bradburn, and subsequently filed upon it as a homestead. All the transfers aforesaid were verbal. For many years it had been unsurveyed land. One settler followed another in the possession thereof. The possession of the land and the use of the water, however, were continuous on the part of John Gird and his predecessors. Appellant contends that all evidence as to any appropriation of water made by any possessor of the land prior to Gird was inadmissible, for the reason that a verbal sale of a water right operates as an abandonment of the same by its owner. It is claimed that the case of *Barkley v. Tieleke*, 2 Mont. 59, settles the law in this respect. This case has frequently been cited in the text-books as a precedent on the question. It is to be borne in mind, however, that *Barkley v. Tieleke*, was decided in reference to mining water rights and ditches considered by themselves, rather than with reference to the mining claims to which they were appurtenant; and whether or not the court in deciding it meant to establish a precedent to be applied to agricultural water rights of the character involved in this suit is extremely doubtful. At the time when *Barkley v. Tieleke*, was decided,—in 1874,—litiga-

tion in Montana in respect to water rights for agricultural purposes was comparatively in its infancy. Within the past few years (see *Quigley v. Birdseye*, 11 Mont. 439; 28 Pac. 741; and *Ditch Co. v. Henry*, 15 Mont. 558, 39 Pac. 1054,—opinions rendered by that able jurist, Mr. Justice De Witt, the subjects in controversy being in reference to water rights for agricultural purposes) this court has viewed somewhat doubtfully the applicability of this decision as a precedent for suits involving agricultural water rights. *Barkley v. Tieleke*, under the condition of facts involved therein, was a most just decision. But one of the premises therein upon which the decision is apparently, though not necessarily, based, we are compelled, after mature consideration, to disapprove at least in so far as it affects conflicting water rights of the present character. The language of the territorial court in that case was, substantially, that where an appropriator of a water right transfers it by an imperfect or verbal conveyance he thereby abandons it, and his transferee in possession is to be regarded, not as a successor in interest, but only as an appropriator by recapture, and therefore as debarred from availing himself of the date of his predecessor's appropriation. A squatter or settler upon unsurveyed public lands of the United States has never been regarded as a trespasser. Such a possession of unsurveyed public land taken in good faith is clearly recognized in the general spirit of congressional legislation (see particularly acts granting government lands to railroads), and is always carefully protected by the courts. Of course, it is subservient to the United States government, or an actual or inchoate grantee of the government. But, as against all others, such a right, based though it be upon mere possession, is absolute. The settler may build and make other improvements upon the land. He has such a possession as to admit of the legal appropriation of a water right therefor. See *Tucker v. Jones*, 8 Mont. 225; 19 Pac. 571. To hold, then, that a settler who sells and transfers the possession of his claim, together with a water right he has appropriated for its benefit, to another settler by doing so abandons said water

right to such an extent as to render it unavailable to his transferee as against an appropriator of water subsequent in time to the first appropriation, is an inequitable doctrine. With reference to water rights of the character before us, an inconsistency in the application of the decision of *Barkley v. Tieleke* would at once become apparent.

We are not aware that it has ever been held in Montana that a squatter on the public domain could not transfer the possession of his claim and the improvements thereon verbally. He unquestionably can; and the transferee whom he puts in possession becomes his successor in interest. To hold, therefore, that this is true of the transfer of a real estate claim, and not true of a water right, merely incidental and appurtenant thereto, is wholly unreasonable. In this connection we have read with interest the pertinent decision of the supreme court of Oregon (see *Hindman v. Rizer*, 27 Pac. 13), and also the recent decision of the supreme court of Colorado (*Nichols v. Lantz*, 47 Pac. 70). In rendering his opinion in this case, Judge Brantly, the judge of the lower court, uses the following apt language: "It is true that conveyances of lands, or any interest therein, must be in writing, or they fall within the statute of frauds, and are void under certain circumstances. It is an elementary principle, however, that no person can take advantage of the void character of a contract unless he be a party to it, an innocent purchaser, or some one who stands in some sort of privity to one of the parties; in other words, no one but a party to a contract, or one who stands in privity with him, can avoid the contract under the statute of frauds. For instance, A sells B his farm, and delivers him the possession of it. He executes no deed to B. As long as B or A does not seek to avoid the contract, or some one who stands in privity with one of them, what has the rest of the world to do with the matter? If they do not care to take advantage of the statute of frauds, no one else can plead it for them." We cannot comprehend the logic of the language in *Barkley v. Tieleke*, which is claimed generally to hold, if it does, and the decision of the supreme court of California,

rendered in 1872 (see *Smith v. O'Hara*, 43 Cal. 373), which does hold, that an appropriator of a water right by verbal transfer abandons it, and therefore divests his transferee, to whom he has honestly intended to surrender the property, of all rights of priority he himself acquired therein. The error seems to lie in the failure to properly distinguish in this connection the true sense of the word "abandon." See *Ditch Co. v. Henry*, 15 Mont. 576, 577, 39 Pac. 1054. By transferring his possession of land, together with a water right appurtenant thereto, a settler certainly does abandon any intention he may have had of personally acquiring a government patent to the property by a compliance with the United States statutes. But a mere failure to execute a deed in no wise justifies the inference that he intends to throw away his honest buyer's rights as well as his own. He personally, and any grantee from him with notice, would be estopped, as intimated in *Barkley v. Tieleke*, from reasserting his rights as against his purchaser. Why, then, should a stranger to his title be allowed a greater privilege; a stranger, too, not in privity with the United States government itself? Different rules apply to the acquisition of title to mining claims from those applicable to agricultural. The right to the possession of a mining claim comes only from a valid location which is a grant. See numerous Montana authorities. We are satisfied that a verbal transferee of a settler's claim and water right appurtenant thereto, who takes possession of the same, is the successor in interest of the original appropriator of the water, that he does not take it by recapture, and that he can avail himself of his predecessor's priority. With appellant's contention that the court was not justified in finding that the first predecessor of Gird (Pickens) appropriated 150 inches of water, we agree. The lower court must have overlooked the fact that said Pickens himself and his son both testified that the ditch of the original appropriation carried about 50 or 60 inches of water, and the record shows no other contemporaneous evidence on the question. It is ordered, therefore, that this case be remanded to the lower court with directions

that either from the evidence heretofore before it, or, if the judge, in his discretion, sees fit to direct the taking of further evidence on the subject, then from all the evidence, a new finding be made as to the original appropriation of water by the first predecessor of John Gird.

Remanded.

PEMBERTON, C. J., and HUNT, J., concur.

MORSE, RESPONDENT, v. CALLANTINE, APPELLANT.

[Submitted January 8, 1897. Decided January 18, 1897.]

Judgment by Default—Vacating—Bond on Appeal.

DEFAULT JUDGMENT—Vacating.—M sued C and H; H retained an attorney to defend himself and C; a demurrer to the complaint was filed in behalf of both defendants, and C was informed and believed that the attorney would conduct his defense, which was the same as that of H; and that no further step would be necessary until April 1st. Demurrer was overruled and an answer filed in behalf of H only, which showed a good defense as to himself and C also; no replication having been filed (as required at that time). H moved for judgment on the pleadings; the plaintiff then (in March) dismissed the action as to H and took judgment by default against C. Held, that C's motion to set aside default, based upon an affidavit setting forth the above facts and accompanied by an answer showing a meritorious defense and similar to the answer of H, should have been granted.

SAME.—That such motions are addressed to the sound discretion of the court, and that the order denying the motion was an abuse of discretion and accordingly reversible by this court.

BOND ON APPEAL.—The appeal was from the judgment and from the order denying C's motion to open the default; only one cost bond was filed; respondent did not make any motion to dismiss upon this ground; but the point was raised in his brief and oral argument. Held, that the error, if any, could not be presented in that manner. Held, also, that only one cost bond is necessary on an appeal from a judgment and order contained in one record.

SAME.—Where respondent moves to dismiss an appeal on account of defect in the appeal bond, appellant may file a sufficient bond, before the motion is decided.

Appeal from District Court, Gallatin County; F. K. Armstrong, Judge.

ACTION by Ebenezer Morse against Felix Callantine. Plaintiff had judgment by default, and defendant appeals. Reversed.

Statement of the facts by the justice delivering the opinion.

19	87
c23	330
19	87
32	100
19	87
e33	4
34	65

19	87
e37	302

The plaintiff in this case brought this action against defendants Stillman Huling and Felix Callantine, alleging in his complaint that in March, 1893, he was the owner and in possession of 520 acres of land described in the complaint, and that on the 16th day of March, 1893, he sold said land to the defendant Huling, reserving unto himself the right to use and lease, free of charge, about 20 acres of said tract of land, which was then used as an orchard, and for the raising of small fruit, and which he was to have, under said lease, for a period of three years from April 1, 1893. It is further alleged that the deed from the plaintiff to Huling contained the contract of the lease of said 20 acres of land. The complaint alleges that the plaintiff immediately after the execution of the deed entered into the possession of the 20 acres of land mentioned, and continued to be and remained in possession thereof at all times, and until on or about the 1st day of June, 1894; that in November, 1893, the defendant Huling sold and conveyed the tract of land, including the 20-acre orchard, to the defendant Felix Callantine, who, when he purchased the tract of land and took his deed therefor, had full knowledge of the rights of the plaintiff in the 20 acres, and of his possession thereof, and that he took his deed subject to the right of the plaintiff to the possession of the 20-acre orchard; that on or about — day of May, 1894, defendants, and each and both of them, forcibly and with arms, and threats of bodily injury, and without any cause whatever therefor, drove the plaintiff from said tract of land, and forbade and refused to allow the plaintiff to use and enjoy said tract of land as by said contract and deed he was entitled to use and enjoy it, and that at all times since then, and now, the defendants, and each of them, refused to allow the plaintiff to enter upon said land, or any part thereof; that the said 20-acre tract of land was planted in small fruit and plants, garden and nursery stock, including various kinds of fruit trees and plants, then owned and raised by the plaintiff for sale; that the fair, reasonable, and rental value for the profit and use of said land during the years 1894 and 1895, was

\$1,000 per year. The complaint further alleges that the plaintiff had upon said 20 acres a large amount of personal property, which is itemized in an exhibit attached to the complaint, of the value of \$230, which the complaint alleges the defendants, and each and both of them, took and converted to their own use and benefit, without the consent of the plaintiff. The plaintiff asked judgment against the defendants, and each of them, for \$2,230, being the rental value of said 20 acres of land for two years and the value of the personal property alleged to have been converted by the defendants. The defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, that it was indefinite and uncertain, and that there was a misjoinder of parties defendant and a misjoinder of causes of action. This demurrer was overruled by the court. Thereafter the defendant Huling filed his answer, and denied that the plaintiff continued in possession of the 20-acre tract of land until June 1, 1894, and alleged that he voluntarily quit the possession of the same on November 19, 1893, pursuant to an agreement with said Huling. The answer denied that plaintiff took possession of the 20-acre tract under the contract or deed above mentioned, but averred that on March 27, 1893, Huling executed a written lease to plaintiff for the said 20-acre tract, pursuant to the terms of the contract originally entered into between the plaintiff and defendant Huling, and under which lease plaintiff entered into possession of the said 20 acres of land, and under which he remained in possession until the 3d day of May, 1893, when, for a valuable consideration, he sold, assigned, and transferred to the defendant Huling all his interest in the 20-acre tract of land, and surrendered the lease to said Huling. The answer denied that when the conveyance of the land was made to the defendant Callantine plaintiff had any interest whatever in the 20-acre tract, or that Callantine took the deed subject to any right of the plaintiff, or that the plaintiff ever had any right therein after May 3, 1893, the date on which it is alleged plaintiff sold his lease to the defendant Huling; denied that either of the defendants, at the

times mentioned in the complaint, forcibly, or with threats of bodily injury, or at all, drove the plaintiff from the land, but alleged that he voluntarily left the land after the surrender to Huling of the lease for a valuable consideration. The answer affirmatively alleges that on the 8th day of April, 1893, in a suit pending in the district court in and for Gallatin county, wherein J. D. McCammon was plaintiff and this plaintiff was defendant, a judgment was duly entered in favor of said McCammon and against this plaintiff, Morse, and that on April 15, 1893, an execution was issued, which, in default of sufficient personal property to satisfy the same being found, was duly levied upon the right, title, and interest of said plaintiff, Morse, in and to the said 20 acres of land, the same having been previously attached by the sheriff of said county; and, after being advertised for sale, the sheriff, on June 1, 1893, sold all the right, title and interest and claim of the said plaintiff, Morse, in and to the said land to said McCammon for \$226.72; that no redemption from this sale was made by plaintiff, Morse; that McCammon assigned his certificate of sale to the defendant Huling, who, at the expiration of six months for redemption, to-wit, on August 1, 1894, received from the sheriff a deed for the land, which deed conveyed to him all the right, title, and interest of plaintiff, Morse, therein; and that the said plaintiff, since April 8, 1893, had no interest whatever in said land, and that the defendant Callantine owned the same free from any right, interest or claim or right of possession of said plaintiff, Morse, under any lease or agreement or contract whatever. The answer also pleads a misjoinder of parties and a misjoinder of action. It denies the conversion of the personal property mentioned in the complaint, as well as the value thereof, and alleges that on the 21st day of December, 1893, there was a full settlement of all the claims which plaintiff had against the defendants on account of the alleged conversion of the said personal property made between the plaintiff and the defendant Huling; and that a suit which was then pending between the plaintiff, Morse, and defendant Huling for damages for the conversion of said

property in the district court of Gallatin county was dismissed as settled. On the 18th day of March, 1895, defendant Huling moved the court for judgment on the pleadings, on account of plaintiff's failing to file a replication to the answer, which motion was denied, the court giving to the plaintiff three days in which to reply. On March 20, 1895, the plaintiff, instead of filing his replication to the answer of defendant Huling, dismissed the action as to said defendant without prejudice, and took judgment by default against the defendant Callantine, who had not answered, in the sum of \$1,038.75.

On April 5, 1895, the defendant Callantine, the appellant in this cause, filed his motion in the district court to be relieved from the judgment by default rendered against him, and to vacate and set the same aside, tendering with said motion an answer, and which motion was supported by the affidavits of himself, defendant Huling, and W. S. Hartman. The answer tendered by defendant Callantine with his motion to open the default against him set up the same facts substantially as those pleaded in the separate answer of the defendant Huling. The affidavits of both of the defendants in support of the motion to open the default in this case show that the defendant Huling had employed counsel to defend the suit as to both of the defendants, and that in pursuance of such employment counsel had filed a joint demurrer to the complaint of plaintiff. Both these affidavits show that the defendant Callantine believed, and had reasons to believe, that the counsel employed by Huling was employed to defend the action as to both defendants, and that they would do so. Both of these affidavits also show that about the 19th day of January, 1895, both of the defendants, after consultation with counsel then employed and acting in the case, got the impression that it would not be necessary to do anything further in the case before the 1st day of April, 1895, that being the first day of the next term of the district court in said county; that they both left the court under that impression; and that, as soon as defendant Callantine learned that judgment by default had been

taken against him, he took immediate steps to have the same set aside. It appears from the record that the defendant Huling had sold the land in controversy to Callantine, and given him a warranty deed therefor, and that when the summons was served on Callantine he immediately notified his co-defendant, Huling, of the fact, when Huling assured him that he need not give himself any trouble about the matter, and that he would take the necessary steps, and defend the suit; and it appears further that Huling, in accordance with said agreement, did so, and supposed he had employed counsel to defend the suit to the end of the litigation. The defendant Callantine appeals from the judgment and order of the court refusing to open the judgment by default, and also from an order made by the court refusing to modify the judgment.

Hartman Bros. & Stewart for Appellant.

Toole & Wallace for Respondent.

PEMBERTON, C. J.—The only question we deem it necessary to determine in this case is as to whether the district court erred in refusing to open and set aside the judgment by default entered in the case against the defendant Calantine. If the court in this matter abused that sound discretion which should control in such cases, then its action was erroneous. To determine this question we must consider all the facts and circumstances of the case as they were presented to the court at the time of the ruling on the motion to set aside the judgment by default. From the facts as shown in the affidavits of both of the defendants, and contained substantially in the statement, we are of the opinion that Callantine believed, and had a right to believe, that counsel had been employed by his co-defendant to attend to the case for both defendants to the end of the litigation. If he was guilty of negligence in this respect, it was certainly excusable negligence. As soon as he learned that the counsel employed in the case had withdrawn as far as he (Callantine) was concerned, and permitted judgment by default to be entered against him, he took immediate steps to

have the same set aside. But there is a more serious question affecting the discretionary action of the court disclosed by the record. Huling's separate answer contained an absolute defense for himself and Callantine as well. Not only so, it set up such a state of facts, which, if true, would show it to be a serious wrong for any court to enter judgment in favor of plaintiff against either defendant. The court's attention had been called to this answer by Huling's counsel asking judgment on the pleadings. The court, properly enough, instead of granting this motion, gave plaintiff three days to deny the facts pleaded in the answer. For some reason plaintiff declined to reply, preferring seemingly to pursue the easier course of dismissing his action as to Huling, and taking a judgment by default against Callantine, who was technically, but we think excusably, in default. Callantine tendered with his motion to set aside the default an answer containing substantially the same facts which had been pleaded in Huling's answer, and which plaintiff declined to traverse by replication when the court gave him leave to do so. Under all the circumstances of the case we think the court should have opened the default, and permitted appellant to answer, and defend the suit, and that the action of the court in refusing to do so was error.

All cases of this kind depend largely upon their own facts. It seems to us that a judgment against the appellant for a large sum of money, under all the circumstances of the case, would operate as an injustice, and that a refusal of the court to open the default and permit the appellant to defend the suit, when the circumstances showed such injustice, was such an abuse of judicial discretion as to constitute reversible error in the case. Counsel for respondent contends that, as there are three appeals in this case, to-wit, an appeal from the judgment, an appeal from the order refusing to open the default, and an appeal from the refusal of the court to modify the judgment, and that as only one appeal bond is given, such bond is insufficient to give this court jurisdiction of the case. This point is not raised by counsel for respondent by a motion to

dismiss, but in his printed brief. It is urged also in his oral argument. We do not think the question of the insufficiency or invalidity of the appeal bond is properly presented. The bond, in our opinion, is evidently not absolutely void; and, if the bond should be considered for any reason defective, we are of the opinion that the appellant would have the right, on a motion to dismiss the appeal on account of any defect therein, to make and file, pending such motion, a sufficient bond. See *Spreckles v. Spreckles*, (Cal.) 45 Pac. 1022. And besides this court has not only held to the doctrine that, if an appeal bond was defective, a sufficient one might be filed pending a motion to dismiss on account of such defect, but in *Watkins v. Morris*, 14 Mont. 354, 36 Pac. 452, this court held that "but one cost bond is required in appealing from a judgment and an order, where such appeal is consolidated into one record."

There are other assignments of error in the record. The appellant contends that the court erred in overruling the demurrer of the defendants, among other things. But we think it unnecessary to pass upon these questions, as the case must go back with instructions to sustain the motion to set aside the judgment entered by default against the appellant. The question of sufficiency or insufficiency of the pleadings may also again be presented to the court, or the appellant may rely upon the merits of his case as disclosed in his answer, which, under this decision, he will be permitted to file. The judgment and orders appealed from are reversed, and the cause remanded for further proceedings in accordance with the views expressed in this opinion.

Reversed.

HUNT and BUCK, JJ., concur.

MULVILLE, ADMINISTRATOR, APPELLANT, v. THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA, RESPONDENT.

[Submitted January 6, 1897. Decided January 18, 1897.]

Accident Insurance—Burden of Proof on Contributory Negligence—Evidence—Instruction—Compromise by Public Administrator—Presumptions.

Contributory Negligence.—In an action upon an accident insurance policy, the burden is upon the defendant to prove contributory negligence, (citing *Higley v. Gümer*, 3 Mont. 90; *Wall v. Railway Company*, 12 Mont. 44, 29 Pac. 721; *Nelson v. City of Helena*, 16 Mont. 21, 39 Pac. 905); this rule is not changed by an allegation in the complaint that deceased, at the time he was injured, was using due diligence for his personal safety.

Evidence.—In such an action, held that evidence tending to show a practice of deceased of jumping on moving trains was properly excluded.

Same.—Evidence having been introduced by defendant showing that the wounded man had been found between the tracks; held that evidence as to the space between the cars and the track was properly admitted in rebuttal, as it tended to contradict defendant's testimony; held, also that plaintiff has the right to introduce in rebuttal testimony on the issue of contributory negligence.

Same.—Plaintiff in rebuttal in order to contradict a witness of defendant offered in evidence the testimony of such witness taken at the coroner's inquest and signed and sworn to by him; to this defendant objected because it did not appear that all the testimony of the witness was taken down at that time; held, 1st, That the objection was properly overruled; 2nd, That, in the absence of anything to the contrary, it would be presumed that all the evidence was taken down.

Instructions.—The policy of insurance provided that it should not include a case where the insured sustained injuries or was killed while violating the rules of any company or corporation; no evidence was offered of any rule which deceased violated; held, that an instruction to the effect that if the deceased received the injuries causing his death while violating a rule of any company, defendant was not liable, was properly refused.

Same—Contributory Negligence.—An instruction to the effect that the plaintiff could not recover if the deceased, by any negligence on his part, caused his death, is too sweeping in its terms and was properly refused.

Administrators—Compromise of Claims.—Held that an order of the court authorizing an administrator to settle a claim belonging to the estate to the best possible advantage was not invalid under section 232, Probate Practice Act, Compiled Statutes 1887, section 2737, Code of Civil Procedure, 1895. The court having first determined the necessity for a compromise may authorize the administrator to settle a claim "to the best advantage possible."

Same—Presumption.—Held, there being no evidence to the contrary, it will be presumed that the public administrator and the court acted honestly and carefully in such a compromise; Held, also that it will be presumed that, before making an order allowing a compromise, the court was informed of the necessity for the same and the terms thereof.

Same—Public Administrator.—The public administrator has the same power to compromise claims as an administrator or executor has. (§ 350 Probate Practice Act, Compiled Statutes, 1887, § 4523, Political Code, 1895, construed.)

19	95
22	534

19	95
28	441

19	95
30	57

19	95
29	829

Appeal from District Court, Silver Bow County; J. J. McHatton, Judge.

ACTION by Samuel Mulville, administrator of the estate of Charles F. Young, deceased, against the Pacific Mutual Life Insurance Company of California. There was a verdict for plaintiff, and from an order granting defendant a new trial plaintiff appeals. Affirmed.

Statement of the facts by the justice delivering the opinion.

This action was brought in the lower court to recover the amount of an accident insurance policy taken out by one Charles F. Young in the defendant company. Young was injured by a train of cars operated by a railroad company in Silver Bow county, and died almost immediately from the effects of his injuries. Letters of administration upon his estate were issued to the public administrator, George Pascoe, of Silver Bow county, and subsequently to the present plaintiff. The complaint sets forth a cause of action under the terms of the policy. The answer sets up two defenses: First, contributory negligence on the part of the deceased Young; and, secondly, a settlement and compromise between the insurance company and the public administrator, Pascoe, while he had charge of the estate. The replication, among other things, sets forth bad faith between the public administrator, Pascoe, and the company, in the settlement and compromise. As to this portion of the replication, however, plaintiff offered no evidence. In order to maintain its second defense, the defendant offered in evidence an order of the probate judge authorizing a compromise, and a receipt from the public administrator, Pascoe. This order and receipt were as follows: "In the Probate Court of Silver Bow County, Montana Territory, March Term, 1887. Journal Entry, April 27, 1887, Journal B, Page 349. [Title of Cause.] It appearing to the satisfaction of this court that it will be for the best interest of the said estate that the claim for insurance money held under policy of insurance issued to said deceased by the Pacific

Mutual Accident Life Insurance Company of California be compromised, it is hereby ordered, and the administrator of said estate is hereby directed to settle said claim, and make a compromise with said insurance company to the best advantage possible. Caleb E. Irvine, Probate Judge. Dated April 27, 1887." The receipt reads thus: "Office of Curtis & Majors, Attorneys at Law, Real Estate and Insurance Agents, and Mining Brokers, Money Loaned on Real Estate, and Special Attention Given to Collections. Butte, Montana, April 27, 1887. Received of the Pacific Mutual Life Insurance Company, by the hands of Thomas Bennett, agent for said company, the sum of two hundred dollars for any amounts now due upon policy No. 5,565 issued by the said company to one Charles F. Young on the 9th day of February, 1887, and being in full of a final settlement for said policy; and I do further acknowledge this to be a just and final settlement of the claim against said company, whom I hereby fully discharge from all obligation, of whatsoever kind or nature. Said settlement is hereby made by the order of the probate court of Silver Bow county, Montana territory. In witness whereof, I have hereunto set my hand and seal the day and year first above written. [Signed] George Pascoe, Administrator of the Estate of Chas. F. Young." The defendant, before the case was submitted, requested the following instructions: "Instruction No. 8. In the policy sued on in this case, there is a provision that it shall not cover a case where the insured sustains injuries or is killed while violating the rules of any company or corporation. Now, if you find, from the evidence, that the deceased, Charles F. Young, received the injuries which caused his death while in the act or attempt to violate the rules of any company or corporation knowingly, then the defendant is not liable under said policy of insurance, and your verdict should be for the defendant." "Instruction No. 15. If the deceased, Charles F. Young, by any act of negligence on his part, caused his death, then the plaintiff cannot recover, and your verdict should be for the defendant." The trial resulted in a verdict for the plaintiff.

The trial court subsequently granted defendant's motion for a new trial, and from this order plaintiff appeals.

Wm. Scallon, for Appellant.

All the facts essential to the plaintiff's case were admitted by the answer, as they were not denied. The burden was upon the defendant to prove the alleged carelessness or negligence. (*Meadows v. Pacific Mutual Life Ins. Co.*, 129 Mo. 76; *Anthony v. Mercantile Mut. Acc. Ass'n*, 162 Mass. 354 38 N. E. 973; *Freeman v. Insurance Co.*, 144 Mass. 572 12 N. E. 372; *Piedmont, Etc., Life Ins. Co. v. Ewing* 92 U. S. 377.) The defense is practically one of contributory negligence, the burden of which is on defendant. (*Higley v. Gilmer*, 3 Mont. 90; *Wall v. Helena St. Ry Co.*, 12 Mont. 44-56, 29 Pac. 721; *Nelson v. City of Helena*, 16 Mont. 21. Or of the breach of a condition subsequent, and the rule is similar. (Abbott's Trial Briefs on the Pleadings, page 172, § 189.) Besides, defendant waived the point by proceeding with its case. (*Bogk v. Gassert*, 149 U. S. 17, 13 S. Ct. 738.) The order of the probate court, and the Pascoe receipt were properly excluded (because, no petition was presented to the court; no notice was given; the alleged settlement was not submitted to the court). (§ 232, Probate Practice Act, 1887.) Our probate system is and was one of statutory regulations. The probate court was one of limited jurisdiction. Compliance with the statute was essential to the validity of its orders. (*Smith v. Westerfield*, 88 Cal. 374, 380, 26 P. 206; *Charlebois v. Bourdon*, 6 Mont. 373, 12 P. 775; *In re Higgins' Estate*, 15 Mont. 474, 39 P. 506; *State ex rel. Bartlett v. Second Judicial District*, 18 Mont. 481.) Counsel also argued that the receipt was properly excluded, for the same reason; and because the settlement had not been reported to and authorized by the court. A public administrator has only such authority as is expressly conferred upon him by law. (*Beckett v. Selover*, 7 Cal. 215.) Questions and offers relating to alleged habit of deceased of getting on trains. It would have been improper to admit such testi-

mony. It would not have proved that he had attempted to get on the train at the time of the accident. The court said: "I can see that the only thing that is material to the determination of this controversy, is whether or not this person was neglectful or contributed to the injuries which resulted in his death at that time; not whether he was neglectful at some other time; but only as to the transaction which occurred at the time he received the injuries." The court was right. (*Baker v. Irish*, 172 Penn. St. 528.) Defendant's instructions Nos. 8 and 15 were properly refused. (*Standard Life and Accident Insurance Co. v. Jones*, 94 Ala. 434, 10 So. 530, holding that this clause must be especially pleaded.) Instruction No. 15 was of such a general and sweeping character as to be improper and erroneous. It went too far. Under it, any inadvertence, or an exposure to an unknown danger through any voluntary act, would defeat the insured. That is not the law. (*Keene v. New England Mutual Accident Association*, 161 Mass. 149, 36 N. E. 891; *Burkhard v. Travellers Insurance Co.*, 102 Pa. St. 262; *Scheiderer v. Travellers Insurance Co.* 58 Wis. 13, 16 N. W. 47.)

Stapleton & Stapleton, for Respondent.

The order and the receipt were a full defense to this action. (*Jeffries v. Mutual Life Insurance Co.*, 110 U. S. 305, 4 S. Ct. 8.) It is contributory negligence to attempt to jump on or off a moving train. (*Sawtelle v. Railway Passenger Insurance Co.* 19 Myers' Federal Decisions, page 813, § 1792; 129 Mass. 440; Railway Accident Law, 376; *Cunningham v. Chicago, M. & St. Paul R. R. Co.*, 17 Fed. Rep. 882, 45 Am. Rep. 316.) Voluntary hazard bars recovery. (Thompson on Negligence, Vol. II, pages 1151, 1152, 1153 and 1154; *Tuttle v. Travellers' Insurance Co.*, 45 Am. Rep. 317; 97 Mass. 278.)

BUCK, J.—The district judge, in granting the motion for a new trial in this case, considered the following alleged errors: First, the refusal to direct a verdict for the defendant when,

at the beginning of the trial, plaintiff declined to offer any evidence, upon the ground that the burden of proof under the pleadings was upon the defendant; second, the exclusion of the probate order and receipt of compromise; third, the exclusion of evidence as to the deceased having made a practice of jumping upon the train which killed him while in motion; fourth, the admission of evidence as to the space between the cars and the track, for the purpose of showing that it was impossible for the deceased to have been between the cars and the track without being crushed to pieces; fifth, the admission in evidence of the written and subscribed testimony of one of the witnesses previously taken at the coroner's inquest; sixth, the court's refusal to give instructions numbered 8 and 15 requested by the defendant. There were other assignments of error, but they are substantially embraced in the one above numbered, "third."

Inasmuch as it does not appear from the record that the district judge, in setting aside the verdict of the jury, assigned any special grounds therefor, it becomes necessary to pass upon all the questions involved in these alleged errors. It is the law of this state that contributory negligence is a matter of defense. (*Higley v. Gilmer*, 3 Mont. 90; *Wall v. Railway Co.* 12 Mont. 44, 29 Pac. 721; *Nelson v. City of Helena*, 16 Mont. 21, 39 Pac. 905.) It is true, in the plaintiff's complaint, it is alleged that, at the time he was injured, he was "using due diligence for his personal safety." Such an allegation, however, was unnecessary, and no proof of the same was required of plaintiff in making out a *prima facie* case. (*Higley v. Gilmer*, *supra*.) There was no error, therefore, in the trial court holding that the burden of proof was upon the defendant to establish contributory negligence on the part of the deceased.

Nor was there any error in excluding evidence as to the deceased having made a practice of jumping on the train while in motion. Upon this we cite, with approval, the language of the supreme court of Pennsylvania, in the case of *Baker v. Irish*, 172 Pa. St. 531, 33 Atl. 558. The court said: "De-

fendant proposed to prove that Baker had made a practice of jumping from the elevator while in motion. * * * What Baker had done before would warrant no inference, or one so remote, that he had done the same on the day of the accident, that the evidence was inadmissible."

Again, the trial court committed no error in allowing evidence as to the space between the cars and the track. It had been stated by a witness that he had found the wounded man between the rails of the track. This evidence, tending as it did, to establish that it was a physical impossibility for the man to have been between the cars and the track without being more crushed, was clearly admissible in rebuttal. This follows as a corollary of the proposition that the burden of proof as to the alleged contributory negligence was upon the defendant.

We find no error in the admission of the sworn and subscribed testimony of a witness before the coroner's jury in order to contradict him. The main ground of defendant's objection was that it did not appear whether all the testimony given by the witness before the coroner had been taken down. In the absence of any showing to the contrary, it should be presumed that it had been.

Instruction No. 8, requested by defendant, was properly refused. As appellant contends, no rules of the railroad company which defendant claims to have been violated had been introduced in evidence. Instruction No. 15, requested by the defendant, was also properly refused. It was too sweeping in its terms.

In the exclusion of the probate order and receipt of compromise, however, we are satisfied the lower court erred, and that it was on this ground alone the district judge granted a new trial. The authorities are to the effect that an administrator has authority to compound or compromise with a debtor of his decedent, when it is to the interest of the estate, irrespective of any statutory power conferred upon him. (See *Jeffries v. Insurance Co.*, 110 U. S. 305, 4 Sup. Ct. 8; *Moulton v. Holmes*, 57 Cal. 337. Whether this be the law of

Montana, where, judging from the general tenor of the probate acts, the legislature seems to have intended to expressly define the duties and powers of executors and administrators, it is unnecessary to determine, because section 232, Probate Practice Act, Compiled Statutes, 1887 (section 2737, Code of Civil Procedure, 1895), expressly confers this power upon administrators. It is as follows: "Whenever a debtor of a decedent is unable to pay all his debts, the executor or administrator, with the approbation of the probate court or judge may compound with him and give him a discharge upon receiving a fair and just dividend of his effects. A compromise may also be authorized when it appears to be just and for the best interest of the estate."

Appellant urges that section 232 aforesaid contemplates that the approbation of the probate judge or court must be obtained to a compromise upon terms which have been definitely ascertained by the administrator and presented for approval. We cannot agree with this construction of the statute, at least so far as applicable to this case. In the order before us it appears that, after the determination of the necessity for a compromise under the statute authorizing it, the judge directed the administrator to settle upon the best terms he could obtain. This was equivalent to giving his approbation to a definite agreement for a compromise. So far as this record discloses, no evidence having been introduced in regard to plaintiff's charge in the replication that the compromise between the public administrator, Pascoe, and defendant was the result of bad faith, the presumption is that both the public administrator and the probate judge discharged their duties to the dead man's estate, in the matter of the alleged compromise, as honest and careful officers should. Unassailed, and considered by itself, the presumption attaching to this order would be that, before signing it, the probate judge was fully informed both as to the circumstances rendering a compromise proper and expedient under the law, and the proposed terms upon which the administrator intended to settle. The statutes in force prescribed no formal method in which the admin-

istrator should obtain the approbation of the court or judge to the compromise he contemplated, nor did they require any notice to be given of the application for it. Evidently what the law had mainly in view in such a case was that the administrator should consult with the probate judge, as a conservator of the estate of decedents, and obtain his assent as such to any compromise he proposed to make. The order might well have been more definite in its recitals, and have set forth carefully the facts upon which it was based, and the terms within which the judge's approbation was given to the proposed settlement. But while, no doubt, this order is open to criticism for informality, we nevertheless cannot hold it invalid.

Appellant claims there is a distinction between a compromise effected by a public administrator and one brought about through an administrator appointed to take charge generally of the affairs of an estate. Under section 350, Probate Practice Act, Compiled Statutes 1887 (section 4528, Political Code, 1895), the public administrator had the same powers as administrators and executors. Section 350 is as follows: "When no direction is given in this chapter for the government or guidance of a public administrator in the discharge of his duties, or for the administration of an estate in his hands, the provisions of the preceding chapters of this title must govern." Entertaining this view of the law, we are of opinion that the order, and, as a necessary consequence, the receipt, should have been admitted in evidence on the trial. The order appealed from is affirmed.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

19	104
20	106
19	104
30	334

THE STATE OF MONTANA, AT THE RELATION OF LEO
C. HARMON, RECEIVER, ETC., APPELLANT, v.
CONROW, ET AL., RESPONDENTS.

[Submitted January 14, 1897. Decided January 18, 1897.]

*Action on Sheriff's Bond for Unlawful Levy—Practice on
Motion for Non-Suit—Delivery of Chattel.*

PRACTICE—Non-Suit—On a motion for a non-suit. all evidence tending to prove plaintiff's case will be assumed to be true.

ACTION FOR UNLAWFUL LEVY OF ATTACHMENT.—The evidence introduced by plaintiff tended to prove that, on July 29th, 1893, the Stock Growers' National Bank of Miles City, being insolvent, suspended business; that B, the cashier, was the only officer, and M was the only director of the bank present at the time; that B, being a debtor to the bank, upon the advice of M, by a written instrument reciting a consideration of one dollar, "sold and assigned" to the bank a certain frame building situated on what is known as the right of way in the town of Red Lodge, which is several hundred miles distant from Miles City, "said building being occupied at present by H. J. Armstrong and Co."; and there was also included a horse and other personal property; the instrument was witnessed by M, and B then in his presence and still acting under his advice deposited the paper in the vault of the bank; that B then notified the bank's bookkeeper of what he had done, and directed him to communicate the same to the person who should take charge of the bank; that on August 8th, before the levy of attachment, B notified Armstrong & Co. in writing, of the transfer, and directed that firm to pay to the receiver of the bank all rents due or to grow due upon the written lease under which they were in possession of the building; that when the levy was made, the clerk in charge of the store told the sheriff of this notice. There was no question of actual fraud, but defendant claimed, in his motion for non-suit, that the transfer was fraudulent as to creditors. *Held*, that under the facts stated there was some evidence tending to show an acceptance of the bill of sale by the bank. *Held*, also, that there was some evidence tending to show a delivery, and that it was error, under these circumstances, to grant a motion for a non-suit.

*Appeal from District Court, Park County; Frank Henry,
Judge.*

ACTION on the relation of Leo C. Harmon, receiver of the Stock Growers' National Bank of Miles City, Mont., against John M. Conrow and others, upon a sheriff's bond, for damages for a wrongful levy. From a judgment on a verdict directed for the defendants, plaintiff appeals. *Reversed*.

Statement of the facts by the justice delivering the opinion.

Action by plaintiff, as receiver of an insolvent national bank, upon a sheriff's bond, for damages for the unlawful

levy upon a frame building, alleged to be plaintiff's property, situate upon a railroad right of way. The writ was issued in the case of *W. B. Jordan, plaintiff, v. E. E. Batchelor, defendant*. Defendants admitted the attachment, denied the ownership of plaintiff, and pleaded a justification by virtue of the writ of attachment heretofore referred to, and execution and sale under process in said suit. The cause was tried before a jury, and plaintiff's testimony was introduced. On defendants' motion the court instructed the jury to return a verdict for the defendants upon some one (although it does not appear which) of the following grounds: "(1) It appears from the evidence that the property described in the complaint, if transferred at all, was transferred to the Stock Growers' National Bank as security for an indebtedness, the amount and extent of which does not appear from the evidence; neither does it appear from the bill of sale, marked 'Plaintiff's Exhibit A,' and the said exhibit A is not executed with the formalities governing chattel mortgages required by law; nor was there any transfer of the possession of the property to the Stock Growers' National Bank. (2) The evidence fails to show that the said bill of sale, marked 'Plaintiff's Exhibit A,' was ever received or accepted by the Stock Growers' National Bank, either as security or otherwise. (3) The evidence fails to show that the Stock Growers' National Bank, or any one for it, ever accepted the property described in the complaint, either as security or otherwise. (4) The evidence fails to show any consideration whatsoever passing from the Stock Growers' National Bank to Elmer E. Batchelor for the transfer of the property described in the complaint. (5) The evidence fails to show any delivery of the property described in the complaint to the Stock Growers' National Bank, or any one for it. (6) The evidence fails to show any acceptance by any officer of the Stock Growers' National Bank prior to its insolvency, or by any one having authority from the comptroller of currency." Judgment was entered for defendants. Plaintiff appeals.

H. C. Loud and Campbell & Stark, for Appellant.

Savage & Day and Strevell & Porter, for Respondents.

HUNT, J.—The well established doctrine of practice under the former codes of this state was that on a motion for a non-suit everything the evidence tended to prove was assumed to be true on appeal to the supreme court. (*Emerson v. Ditch Co.*, 18 Mont. 247, 44 Pac. 969.) To ascertain, therefore, whether there was a sale and delivery of the building, we must look into the evidence. The facts are as follows: On July 29, 1893, the Stock Growers' National Bank of Miles City, Montana, became insolvent, and in the afternoon of that day closed its doors to business. As there were numerous persons who owed the bank considerable money, Mr. Middleton, a director in the bank, in the forenoon of July 29th, advised Batchelor, the cashier, that it was desirable to obtain security upon these various loans. Batchelor himself owed the bank a considerable sum, and in the forenoon, in accordance with Middleton's prior suggestions, executed to the Stock Growers' National Bank a bill of sale, reciting that in consideration of one dollar he sold and assigned unto the Stock Growers' National Bank of Miles City the following described property, to-wit: "One one-story frame building situated in what is known as the 'right of way' in the town of Red Lodge, Park county, Montana, said building being occupied at present by H. J. Armstrong & Co." There were also included in the bill of sale a saddle horse in the possession of W. W. Alderson at Muddy, Mont., one Victor bicycle, and one set of bedroom furniture. The bill of sale was witnessed by Mr. Middleton. The bicycle and bedroom furniture were left by Batchelor in the bank, and subsequently passed into the hands of the receiver for the bank's benefit. Batchelor was the only officer of the bank in town upon the day of the failure, and Mr. Middleton thinks he himself was probably the only director in town. Mr. Batchelor was advised by Mr. Middleton, who by profession was and is a lawyer. When the bill of sale was executed, Batchelor put it into the vault of the bank in the presence of Middleton. Batchelor notified the

bookkeeper of the bank of the execution of the bill of sale, and of his having deposited the same inside the vault, and told the bookkeeper to inform whoever came to take charge of the bank that he had given a bill of sale, and placed it in the safe of the vault. The building described in the bill of sale was occupied by the firm of druggists of H. J. Armstrong & Co., at Red Lodge, Mont., under a written lease made February 14, 1893, between Batchelor and Armstrong & Co., running for two years from February 14, 1893. Upon August 8, 1893,—10 days after the failure, but before the levy of attachment in the suit of *Jordan v. Batchelor*,—Batchelor notified Armstrong & Co. in writing that he had given to the Stock Growers' National Bank a bill of sale for the drug store building, and directed said firm to pay rent then due, or to be due in future, to the parties in charge of the bank. When the sheriff levied upon the property, the person in charge of the business of Armstrong & Co. at Red Lodge told him that Armstrong & Co. had received Batchelor's order notifying them of the sale of the building to the bank. In answer to the notice of garnishment served by the sheriff, Armstrong & Co. stated that they had in their possession the sum of \$50 due Batchelor for rent to date. The sheriff put one of the firm of Armstrong & Co. in charge as a keeper when he levied the execution, and advised him that he must pay the rent to the sheriff. The member of the firm told the sheriff that he did not care to whom he had to pay the rent, as he would just as soon pay it to the sheriff as to the Stock Growers' National Bank.

It seems to us quite clear that the tendency of this evidence was to prove a sale and delivery of the building to the bank, and a valid acceptance thereof by its officers. Batchelor, an officer and debtor of the bank, which was to close its doors in a few hours, in obedience to the request of the only then present director of the bank, to protect the institution executed a bill of sale of certain property including a building several hundred miles away, in the possession of a tenant under a written lease. The consideration for this transfer was Batche-

lor's debt to the bank. There being no official of the bank present other than the director, upon whose advice Batchelor acted, Batchelor, in the director's presence, put the bill of sale in the vault, also telling a clerk of his action, and of the whereabouts of the bill of sale. "I did nothing," testified the director, "at that time, after the execution of the bill of sale, except witness it, and see it was put in the vault." The circumstances were peculiar. It is conceded that there is no element of intentional fraud in the case. The property was incapable of physical tradition, and lawfully in possession of a tenant. The bill of sale was executed and deposited where other valuable papers of the bank were naturally kept; all at the suggestion of a director, who seems to have acted for the bank with a measure of authority which was recognized by Batchelor. These acts by the director and Batchelor, together with the latter's subsequent act of advising the tenants of the sale to the bank, constituted a delivery and acceptance, valid against creditors under the statute. (Compiled Statutes 1887, § 226.) The respondents' argument that the acts of the seller cannot alone constitute a delivery is not applicable, because the evidence warrants the assumption by us, on the motion for a nonsuit, that the vendee, the bank, did, by its director, as fully as it possibly could at the time, accept the building. To hold otherwise would lead to the proposition that, if a bank is failing, and the only officer in charge is personally one of the debtors, that officer cannot personally execute a bill of sale of a leased building to the bank in good faith to protect it, and the bank cannot accept the same through the only other officer present, a director. We cannot assent to this where the circumstances show an honest purpose to transfer the property, and where the receiver subsequently ratifies the director's acceptance. As we view it, the delivery was sufficient on the ground that no other delivery was practicable under the circumstances, and that the acts performed were intended as a delivery of the house and an assignment of rents under the lease thereof. (*Tuttle v. Bank*, 19 Mont. 11, 47 Pac. 203; *Thomas v. Hillhouse*, 17 Iowa 71; *Tiedeman on*

Sales, § 106.) Respondents say that the assignment of the lease and rentals was not complete until accepted by the assignee, or acted upon by the debtor; and that a mere direction by the creditor to his debtor to pay the debt to a third person, without the latter's knowledge or assent, is not sufficient to defeat a garnishment. But the evidence is that the notice of sale to the tenants, and the order to pay rentals, was received by the tenants before the attachment was levied by the sheriff. As tenants, Armstrong & Co., were indifferent to the complications arising by claimants to the rentals or building, and so expressed themselves to the sheriff, who ordered them to pay the rent to him. They explained their position—and the evidence of their explanation was not objected to—to the sheriff, and evidently did not mean to deliberately acknowledge themselves as holding any property or money belonging to Batchelor as against the bank. In this respect the case is to be distinguished from *Bank v. Barnes*, 18 Mont. 335, 45 Pac. 218. The case is, therefore, not within the rule of decision as announced by Waples on Attachment § 416, and other books cited by respondent, where there was an absence of any notice or acceptance of or assent to an agreement whereby the debtor, instead of paying the debt to the creditor, agrees to pay it to a third person. The facts at bar rather bring our decision upon this point within the rule of *Bank v. Barnes*, cited above, where it was laid down that an order to pay to a creditor money due or to become due creates an equitable interest in the fund in favor of the assignee, and that it is not necessary that the debtor upon whom the order is drawn should assent to the transfer. Batchelor having parted with his interest in the property before attachment and garnishment, and notice of such sale having been brought home to the officer before seizure, the rights of the bank are paramount to those acquired under the process. Drake, Attachment §. 223. This discussion disposes of the points relied on by respondents, and leads to the conclusion that the court ought not to have directed a verdict for the defendants. Judgment reversed.

PEMBERTON, C. J. and BUCK, J., concur.

Reversed.

GENERAL ELECTRIC COMPANY, APPELLANT, v. BLACK
ET AL., RESPONDENTS.

[Submitted January 13, 1897. Decided January 13, 1897.]

Action on Assigned Account—Pleadings—Instructions.

PLEADINGS—Issue.—Plaintiff brought suit to collect of the defendants, trustees of the Bozeman Light Co., an account claimed to be due from that company to the Thomson-Houston Electric Co., and to have been assigned to plaintiff on November 20th, 1889. The answer denied the assignment of the account to plaintiff, alleged that the account was assigned to a corporation other than plaintiff on the 24th day of March, 1890, and alleged payment to have been made to that corporation prior to the commencement of the suit; the replication denied all of the allegations in the answer. Verdict for the defendant. *Held*, that the only material issue in the case was whether or not the account had been assigned as alleged in the answer; and that an instruction confining the inquiry of the jury to that issue was correct.

PRACTICE—Record.—The practice of incumbering a record with immaterial matter and numerous assignments of error which are not relied upon, is commented upon by the court.

Appeal from District Court, Gallatin County; F. K. Armstrong, Judge.

ACTION by the General Electric Company against M. M. Black, W. M. Nevitt, and Rosa G. Black, on an account. From a judgment in favor of the defendants, plaintiff appeals. Affirmed.

Statement of facts by the justice delivering the opinion.

This suit was brought by the plaintiff to collect of the defendants, who are the trustees of the Bozeman Electric Light Company, an account which it is alleged was due and owing from the Bozeman Electric Light Company to the Thomson-Houston Electric Company on the 20th day of November, 1889, and which it is alleged the Thomson-Houston Electric Company assigned to the plaintiff company on the 1st day of November, 1894; recovery being sought in this case against the trustees of the Bozeman Electric Light Company on account of their failure to file a statement of the condition of said company, as required by the statutes of Montana. The

answer of the defendant denies the indebtedness of the Bozeman Electric Light Company to the Thomson-Houston Electric Company sued for, and avers that all the indebtedness which said Bozeman Electric Light Company ever owed to the Thomson-Houston Electric Company had been fully paid before the commencement of this suit. The answer also denies that the Thomson-Houston Company, for value, or otherwise, ever sold or assigned the account sued on to the plaintiff company. The answer affirmatively alleges that the account sued on was transferred and assigned by the Thomson-Houston Electric Company to the Northwest Thomson-Houston Electric Company on or about the 24th day of March, 1890, and that on or about the 6th of April, 1891, the Bozeman Electric Light Company fully paid off and discharged the account sued on to the Northwest Thomson-Houston Electric Company, which was the owner and assignee of said account. The evidence that payment of the account sued on was made to the Thomson-Houston Electric Company as alleged is not contradicted, nor is it contended by the plaintiff that the account was ever reassigned to the Thompson-Houston Electric Company. The replication of the plaintiff denies payment of the account, and also denies that the account was ever assigned by the Thomson Houston Electric Company to the Northwest Thomson-Houston Electric Company. The case was tried to a jury, who rendered a verdict for the defendants. on which verdict the court rendered judgment. The plaintiff appeals from the judgment and the order denying a new trial.

Luce & Luce, for Appellant.

Toole & Wallace, for Respondents.

PEMBERTON, C. J.—The appellant contends that the only issue tried in the court below was as to whether the account in suit had been paid, and that the court, at the close of the evidence, erroneously took this question from the jury, and, by instructions, confined and limited the jury to the question as to whether the Thomson-Houston Electric Company had as-

signed the account to the Northwest Thomson-Houston Electric Company, as alleged in the answer before suit. We think this contention is not supported by the record. The question as to whether the assignment of the account had been made by the Thomson-Houston Electric Company to the Northwest Thompson-Houston Electric Company before suit was a very material issue tried in the lower court. The evidence of the bookkeepers of the Thomson-Houston Electric Company and of the Northwest Thomson-Houston Electric Company was introduced, and by this evidence it appears from the books of both these companies that the account sued on had been assigned as alleged in the answer of defendants. If it be conceded that the assignment was so made, then the question of payment of the account became immaterial, although it is not disputed that payment was made to the Northwest Thomson-Houston Electric Company; for, if the account had been assigned as alleged in the answer, then this plaintiff company, which claims the account was assigned to it in 1894, long after its assignor had parted with its title to the account, acquired no title thereto by its alleged assignment. We think the evidence set up in the answer sufficient to support the verdict. We think the only material question to be determined at the trial below was as to whether the account was assigned, as alleged in the answer, before suit. And we see no error in the action of the court in confining the inquiry of the jury to that one issue by the instruction given, which we think was correct, as declaring the law applicable to the facts and pleadings in the case.

We cannot close this opinion without noticing what we consider a reprehensible practice, as disclosed by the record. As we view the case, there is but one material question presented by the record. That we have treated above. But there are 100 assignments of error contained in the record. We are utterly amazed that counsel occupying a prominent and enviable place in the ranks of the profession should feel called upon to so encumber a record with useless and immaterial matter and assignments. It is a profitless labor to them. It entails

labor and hardship upon this court, that can find no reasonable excuse, besides entailing unnecessary expense upon litigants. This practice is so common that we feel it our duty to thus protest against it. Let our strictures be understood as applying to this practice generally, and not specially to the record and counsel in this case. The judgment and order appealed from are affirmed.

Affirmed.

HUNT and BUCK, JJ., concur.

HUSTON, RESPONDENT, v. NUSS, APPELLANT.

[Submitted January 11, 1897. Decided January 18, 1897.]

Fraud—Findings—Review on Appeal.

FORECLOSURE OF MORTGAGE—Findings.—As a defense to an action to foreclose a mortgage, defendants contended that plaintiff agreed to deliver the money borrowed to one "K" to be used in a business venture, and that "K" was to repay plaintiff from the profits, that plaintiff, instead of so doing, kept the money and used it in the same venture, and failed to apply upon the debt moneys realized from the business; plaintiff claimed that the agreement was that he was to carry on the business until the amount borrowed was repaid from the venture and that he was then to turn the business over to "K;" that he carried out his agreement, and that the net amount realized was so applied, but left a deficit, the amount sued for; he'd, that the finding of the jury upon these issues in favor of the plaintiff, being supported by the evidence, would not be reversed by the appellate court.

Appeal from District court, Silver Bow County; J. J. McHatton, Judge.

ACTION to foreclose a mortgage. Defendants (appellants here) admit the execution of the note and mortgage pleaded, but allege fraud and misrepresentation, by means of which they were induced to execute the same. Verdict and judgment for plaintiff. Defendants appeal. Affirmed.

W. I. Lippincott, for Appellants.

Charles O'Donnell, for Respondent.

HUNT, J.—The appellants argue that the evidence was insufficient to justify the verdict of the jury. The question of

fact which arose on the trial was as to the agreement between the mortgagor and mortgagees at the time of the execution of the mortgage. The defendants contended that the \$1,000 borrowed was to be delivered by plaintiff, (respondent) to one Kinney and another to engage in a turkey-selling venture in Butte, and that said Kinney and his associate would repay plaintiff from the moneys or profits received from the business venture; but that, after the note and mortgage were executed, the plaintiff, instead of delivering the \$1,000 to Kinney and his associate, Carter, entered into the business himself, and used the money therein, and failed to turn the same over to Kinney and Carter, as agreed. The plaintiff explained this on rebuttal by testifying that the defendants executed the mortgage and note upon the understanding that the plaintiff was to order the turkeys, and to have them come in his name, and that, when the \$1,000 was realized, he was then to transfer the business to Kinney and Carter; that all this was done at defendants' express request, and in order that the moneys realized from the sale of the turkeys should be properly applied to reimburse plaintiff; and that his agreement was carried out by plaintiff's ordering the turkeys in his name, but that the net sales realized amounted to only \$518.42, which was applied on the note. The jury found that there was no fraud or misrepresentation on plaintiff's part. They were fully justified in doing so under the evidence, and we shall not disturb their verdict.

The only other error relied on is the alleged failure to properly apply the money received to the payment of the note. This point is not well taken, as there is evidence to prove that the plaintiff did apply the net receipts of the sales of the turkeys upon the note, but that they were insufficient to wholly pay the same. The judgment and order must be affirmed.

Affirmed.

PEMBERTON, C. J., and BUCK, J., concur.

STEBBINS, APPELLANT, v. MORRIS, RESPONDENT.

[Submitted January 18, 1897. Decided January 25, 1897.]

Husband and Wife—Agreement to Separate—Pleading.

HUSBAND AND WIFE—Agreement to Separate.—an agreement between husband and wife providing for a separation, an adjustment of their respective interests in property and for the future support and maintenance of the wife, is valid only when it is to take effect at once and is immediately complied with, and when the marital relations are of such a character as to render a separation necessary for the health or happiness of one or the other; mere willingness to live apart is not enough, neither will the agreement be enforced when it is the result of mutual caprice or reckless disregard of marital obligations; neither will such an agreement be enforced when it is to be used as a means to facilitate a divorce.

SAME—Held, accordingly, a demurrer to the complaint was properly sustained, where the complaint alleges the agreement to live apart, the mutual obligations thereunder and the breach of the contract by the husband, but neither the agreement nor the complaint contains any statement of facts showing the necessity or cause for such separation.

Appeal from District Court, Park County; F. K. Armstrong, Judge.

ACTION by Ellen M. Stebbins against Robert O. Morris. Demurrer to the complaint was sustained, and plaintiff appeals. Affirmed.

Statement of the case by the justice delivering the opinion.

In her complaint the plaintiff alleges "that on the 20th day of June, 1885, for the purpose and object of settling and adjusting the interest and right of herself and husband in and to certain property, and for the purpose of providing for the future support and maintenance of the plaintiff by the said defendant, and as evidence of their determination and agreement not to live together as man and wife any longer, the said parties made and entered into a contract in writing and articles of separation, a copy of which is hereto attached, marked 'Exhibit A.' " Further on it is alleged that the defendant, although often requested, has failed and refused to pay over to the plaintiff any of the proceeds derived from the sale of the product of the oil wells mentioned in the agreement, but

19	115
19	158
19	159

has converted the same to his own use. Continuing, she avers "that since the said 20th day of June, 1885, and since the making of said contract, this plaintiff, in an action commenced by herself against this defendant in the district court of the First district of the territory of Montana, holding terms at Bozeman, Montana, obtained a decree of divorce dissolving the bonds of matrimony heretofore existing between them; that this plaintiff, relying upon the terms and provisions of said contract so made and entered into by and between them relative to their said property so acquired and owned by them as aforesaid, did not make any demand or claim for any adjustment or decree as to their said property or right therein, but relied upon said contract, and believed that the defendant would carry the same out." Exhibit A reads as follows: "This article and deed of separation, made and entered into the 20th day of June, 1885, by and between Robert O. Morris, husband, of Gallatin county, and Montana territory, party of the first part, and Ellen M. Morris, wife, of the said county and territory, party of the second part, witnesseth: That for and in consideration of the sum of one hundred dollars in hand paid by the said party of the first part to the said party of the second part, and other and divers considerations hereinafter mentioned have by these presents agreed, and by these presents do agree, for the rest of their natural lives to live separate and apart from each other, and to renounce and surrender each to the other all of their marital rights, and it is agreed and understood that the said first party is to pay to the said second party the sum of one hundred dollars on the 20th day of October, 1885, and the further sum of two hundred dollars on the 20th day of March, 1886; and it is further agreed and understood by the parties hereto that the party of the first part, or his agent, J. L. Morris, of McKean county, Pennsylvania, or any other agent the said first party may select to act for him, shall pay to the said second party the one-half of the net proceeds arising from the sale of oil on what is known as the 'Morris Homestead,' in Bradford township, McKean county, Pennsylvania, to the extent of the interest now

owned by the said Robert O. Morris in the oil wells upon said land. The one-half of all proceeds due the said first party arising from the sale of oil as aforesaid to be paid to the said second party, her agent or attorney, monthly after and immediately upon the sale of oil being made and as long as oil is produced upon said tract of land. And it is further provided that the said first party shall have and make no claim for the services of the party of the second part, and shall not be liable for her support and maintenance, or for any debts hereinafter contracted by her. That the said party of the second part agrees to release, and does hereby release, all claims of dower or other demands against the personal or real estate of the said party of the first part. In witness whereof the said parties have hereinafter set their hands and seals the day and year first above written. Robert O. Morris. [Seal.] Mrs. Ellen M. Morris. [Seal.]” (Duly verified and acknowledged.) The prayer is for an accounting, and for the enforcement of the terms of the agreement. Defendant filed a general demurrer. This the court sustained, and, upon the plaintiff’s abiding by her complaint, judgment was rendered against her. She appeals from this judgment.

Smith & Wilson and H. J. Miller, for Appellant.

The court below erred in sustaining the demurrer to the complaint. (Pomeroy’s Equity Jurisdiction (2d Ed.) Vol. II. § 932; Story’s Equity Jurisdiction (12th Ed.) §§ 1379, 1380; *Garbet v. Bowling*, 81 Mo. 214; *Carson v. Murray*, 3 Paige 483; *Clark, Trustee, v. Fosdick* (N. Y.) 6 L. R. A. 132; *Galusha v. Galusha* (N. Y.) 6 L. R. A. 487; *Winn v. Sanford*, 148 Mass. 39; *Walker v. Walker*, 9 Wall. 743; *Rodney v. Chambers*, 2 East. 297; *Bettle v. Wilson*, 14 Ohio 257; *Dupre v. Rein*, 56 How. Pr. 230; *Calkins v. Long*, 22 Barb. 97; *Worrall v. Jacob*, 3 Mer. 256; *Hobbs v. Hull*, 1 Cox 445; *Scott’s Appeal* (Pa.) 23 A. 214; *Storey v. Storey*, 125 Ill. 608; *Rains v. Wheeler*, 76 Tex. 390; *Wallingsford v. Allen*, 10 Peters 583; *Fitzer v. Fitzer*, 2 Atk. 526; *Gurth v. Gurth*, 3 Brown’s Ch. 616; *Frampton v. Frampton*,

4 Beav. 287; Pomeroy's Equity Jurisdiction (2 Ed.) § 1100; Story's Equity Jurisdiction (12 Ed.) §§ 1279, 1380; *Wal-lingsford v. Allen*, 10 Peters 583; *Shepard v. Shepard*, 7 Johnson Ch. 57; *Agnew's Appeal* (Pa.) 12 A. 160; *Gurth v. Gurth*, *supra*; *Fitzer v. Fitzer*, *supra*; *Frampton v. Frampton*, *supra*.

Campbell & Stark, for Respondent.

BUCK, J.—The main question discussed in the briefs on file in this case is whether or not the contract set forth in plaintiff's complaint is void as against public policy. Under the Montana Codes which took effect in 1895 (sections 215, 216, Civil Code), an agreement for an immediate separation between a husband and wife is expressly allowed, and their mutual consent is declared to be a sufficient consideration. The present controversy arose, however, even prior to the enactment in 1887 of what is generally known as the "Married Woman's Emancipation Act." This necessitates a consideration of the question with reference to the common-law status of a married woman as this was substantially the legal status of the plaintiff when she entered into the agreement. Agreements for separation have been a fruitful source of litigation. To an investigator of the many decisions on the subject, both in the United States and England, it is apparent that a majority of the later judges, in sustaining such agreements, have acted reluctantly, with a latent suspicion in their own minds of the legal logic of their conclusions. They seem to have yielded to precedent with a disagreeable consciousness that what they declare to be the law is such rather as the result of judicial legislation than anything else. Chancellor Walworth, in *Carson v. Murray*, 3 Paige 500, says: "It may well be doubted whether public policy does not forbid any agreement for a separation between husband and wife, except under the sanction of a court of justice; and whether it does not also require that such agreements should be limited to those cases where, by the previous misconduct of one of the parties, the other is entitled to have the marriage contract dissolved, either

wholly or partially, by a decree of the competent tribunal." And then, after commenting on the protests of Lord Eldon against the doctrine of sustaining such agreements, expressed in *St. John v. St. John*, 11 Ves. page 526, and *Westmeath v. Westmeath*, Jac. 126, the chancellor proceeds: "It has, however, long since become the settled law in England that a valid agreement for an immediate separation between a husband and wife, and for a separate allowance for her support, may be made through the medium of a trustee. And, as many of the decisions which have gone to the greatest length on this subject took place previous to the Revolution, they have been recognized here as settling the law in the state to the same extent." In somewhat the same manner the supreme court of the United States, in *Walker v. Walker*, 9 Wall. 750, expresses its adherence to the doctrine. In that case the court said: "It is contended that deeds of separation between husband and wife cannot be upheld, because it is against public policy to allow parties sustaining that relation to vary their duties and responsibilities by entering into an agreement which contemplates a partial dissolution of the marriage contract. If the question were before us, unaffected by decision, it would present difficulties, for it cannot be doubted that there are some serious objections to voluntary separations between married persons. But contracts of this nature for the separate maintenance of the wife, through the intervention of a trustee, have received the sanction of the courts in England and in this country for so long a period of time that the law on the subject must be considered as settled." See, also, Schouler on Dom. Rel. § 215 *et seq.*; Bishop on Marriage, Divorce and Separation, Vol. 1, § 1263 *et seq.* The reason for this doubt and reluctance on the part of these judges is due to the fact that the public is directly interested in the inviolability of the marriage contract, and that the power to sever the tie is vested in the courts alone. It also results from the general doctrine that at common law a married woman had no contractual capacity. (*Legard v. Johnson*, 3 Ves. Jr. 352.) Certainly, when confronted by these rules of law, the doctrine

that a contract entered into by a married woman and her husband for separation is enforceable without enabling statutes, trenches strongly on judicial legislation. The later English courts have gone much further in this direction than most of the American courts. In commenting upon the language used in his decision on this question by an English judge, Mr. Bishop, in his work on Marriage, Divorce and Separation (section 1263, volume 1), indulges in the following somewhat too vigorous criticism: "In the United States public opinion changes law as often as it does in England, but with us legislation ratifies the change; and, until the ratification in this form transpires, the judiciary is compelled, however much against its will, to remain quiescent." But a more elaborate discussion of the arguments for and against the doctrine would be of interest only to the curious student. However logical and sound the reasoning that has been and may be urged contra, by force of precedents it is firmly imbedded in the common law as interpreted by many of the best courts in the United States. See cases *supra*; also *Bettle v. Wilson*, 14 Ohio 257; *Garbut v. Bowling*, 81 Mo. 214; *Randall v. Randall*, 37 Mich. 563; *Blaker v. Cooper*, 7 Serg. and R. 502; *Wells v. Stout*, 9 Cal. 480; *Clark v. Fosdick* (N. Y. App.) 22 N. E. 1111; *Rains v. Wheeler*, 76 Tex. 390, 13 S. W. 324, and numerous other authorities. We are compelled to accept the general doctrine of these cases. But we are of the opinion that it is clearly subject to these limitations. An agreement for a separation which is to take place in the future is void as against public policy. So, too, after such an agreement is entered into, its terms must be immediately complied with on peril of nullity. And at the time of the making of such an agreement the relations between the husband and wife must be of such a character as to render the separation a matter of reasonable necessity for the health or happiness of the one or the other. There must be a moving cause for it in addition to the mere mutual volition of the parties. If it is the outcome of mutual caprice only, or a reckless disregard of the obligation of the marriage tie, then the courts will not en-

force it. In almost all the cases that we have investigated, either from the recitals in the agreement for separation itself or from extrinsic evidence offered in connection therewith, the court has had before it an unhappy condition of marital relations as a moving cause for the contract. Judges have carefully discriminated between agreements for separation, outgrowths of domestic sorrow, entered into for the purpose of avoiding public scandal or notoriety, and those which have resulted from a wanton or reckless disregard of one of the highest obligations of life,—the duty which the husband and wife mutually owe to each other and to the public at large. In this view of the law, an agreement for separation of the latter kind would be a mere usurpation of the power conferred upon the courts alone to adjust marital dissensions in decrees of divorce.

Tested, then, by these rules, what does this complaint show? Merely that the plaintiff and defendant agreed to separate, and divide the property which they had hitherto enjoyed together. No intimation is contained in the complaint that there was any necessity or moving cause for the separation other than mere caprice or purely voluntary consent. There is no allegation under which any other evidence in respect to it could be presented to the court. The demurrer was properly sustained. Had the complaint properly set forth any urgency or reasonable necessity for the agreement, then, no doubt, a cause of action would have been stated. Had it properly averred that the plaintiff had been imposed upon or defrauded by her husband in respect to this agreement, such averments would no doubt have altered the phase of the situation, and entitled the plaintiff to the relief demanded. But no such allegations appear. The complaint, too, while not perhaps directly susceptible of the inference,—from the ambiguous manner in which it refers to a subsequent divorce obtained by the plaintiff,—might very readily have engendered a suspicion in the mind of the district judge that the agreement had been entered into in contemplation of the divorce. In fact, from his written opinion, now before us, it appears

that he did entertain such a suspicion. Moreover, counsel for respondent assert in their brief (and the statement is uncontroverted by the counsel for appellant) that the divorce was obtained on the same day that the agreement was entered into. If this is a correct statement, there is no impropriety in our citing another line of authorities, which, while generally illustrative of the principles of law governing agreements for separation we have been discussing, may also particularly apply to and settle this controversy. It is a general and uniform rule that any agreement entered into between husband and wife with a view to facilitating the dissolution of their marriage contract is void. (See *Phillips v. Thorp*, 10 Or. 494; *Speck v. Dausman*, 7 Mo. App. 165; *Cross v. Cross*, 58 N. H. 373; *Kilborn v. Field*, 78 Pa. St. 194. If, then, the agreement relied upon in this case was entered into between the parties in contemplation of and for the purpose of facilitating the divorce obtained by the wife, it should be held void, as collusive. If, however, it can be established that it was entered into without any collusive intent, and as merely incidental to a decree of divorce obtained without collusion, the plaintiff's right to recover would assume a different aspect. (See *Schmieding v. Doellner*, 10 Mo. App. 373; *Storey v. Storey*, 125 Ill. 608, 18 N. E. 329.)

Respondent's counsel claim that this agreement is executory in character, and for this reason not enforceable; but we do not approve the attempted distinction. Nor do we agree with their contention that the agreement is void because there was no intervention of a trustee. Many of the courts have clung to the old doctrine that the intervention of a trustee is essential to the validity of an agreement for a separation, but we are of opinion that the more correct and modern rule is that no such intervention is necessary. See *Boone v. Chiles*, 10 Pet. 255; 1 Beach on Modern Equity Jurisdiction, § 198. The judgment is affirmed, with costs, but it is ordered that the cause be remanded, with directions to the lower court to grant leave to the plaintiff to amend her complaint within a reason-

able time, if, bringing herself within the tests of the law as herein stated, she has a cause of action.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

HEFFERLIN, RESPONDENT, v. KRIEGER, ET AL.,
APPELLANTS.

[Submitted January 15, 1897. Decided January 25, 1897.]

*Promissory Note—Accommodation Maker—Misuse of Funds
by Principal—Laches—Pleading.*

PROMISSORY NOTE—Action against Accommodation maker.—The complaint alleged that the defendants and one M executed and delivered to one H their promissory note, which H assigned to plaintiff before maturity and for a valuable consideration; the answer denied that the note was ever delivered to the payee, that the note was ever assigned to plaintiff by endorsement or otherwise, or that the plaintiff was the owner or holder of the note. As an affirmative defense the answer alleges, that the defendants, at the request of M and for his accommodation, signed the note upon the agreement of M to use the money for a specific purpose, that plaintiff knew the purposes for which the note was executed by defendants and that they were merely sureties, and defendants denied that H ever advanced any money on the note, and alleged that any money advanced by plaintiff was so advanced as the agent of H, who, it is further alleged, also knew the circumstances under which and the purposes for which the defendants executed the note; the answer further alleges that M did not use the money for the purposes agreed upon, but does not state for what purpose it was used. The answer, as a further defense, alleges that, when the note fell due, and for several months thereafter, M (for whom there were sureties) was solvent and able to pay the note, and that the same would have been paid, if presented in time; that since that M had become insolvent, and was insolvent when the note was presented for payment. A demurrer to the complaint was sustained as to the affirmative matter; trial was had on the issues raised by the denials in the answer; plaintiff had judgment, from which defendants appealed.

- 1st. *Held*, the appeal being from the judgment alone, it will be presumed that the issues raised by the denials of the answer were sustained by the evidence and that the facts found by the jury accord with the allegations contained in the complaint.
- 2nd. *Held, further*, that as to the affirmative defense the answer was uncertain and indefinite, because it does not state the purposes for which M did use the money or that the plaintiff was injured by his use of the same.
- 3rd. *Held*, that the mere delay in presenting the note and in attempting to collect it from M did not constitute a defense. (*Smith v. Freyler*, 4 Mont. 489, 1 Pac. 214, followed.)

Appeal from District Court, Gallatin County. F. K. Armstrong, Judge.

ACTION by C. S. Hefferlin against F. A. Krieger and another on a promissory note. From a judgment in favor of plaintiff, defendants appeal. *Affirmed.*

Statement of the case by the justice delivering the opinion.

This is a suit on a promissory note. The plaintiff, as indorsee, seeks to recover judgment against the defendants Krieger and Thompson, on a promissory note which was executed on the 22d day of April, 1887, by one J. J. McBride and these defendants to William Hefferlin, for the sum of \$350, payable six months after date, with interest at 1½ per cent. per month from date, with attorney's fees in case payment should have to be enforced at law, and which note plaintiff alleges was assigned to him for a valuable consideration by the said William Hefferlin on or about the 1st day of May, 1887. The answer admits the execution of the note, but denies on information and belief that the same was assigned on the 1st day of May, 1887, or at any other time, for a valuable consideration, by indorsement or otherwise, or delivered to plaintiff by the said William Hefferlin; and it is denied that the note was ever delivered to William Hefferlin, or any one for him. The answer denies further that the plaintiff is the owner or rightful holder thereof. The answer further alleges as an affirmative defense that on or about the 22d day of April, 1887, the defendant J. J. McBride, having been appointed postmaster at the post office of the city of Livingston, and being desirous of purchasing the fixtures then owned and used by F. W. Wright, the former postmaster, in the building on the lot adjoining the property of the appellants, importuned these appellants to sign a note with him for the purpose of raising money to purchase said fixtures, promising these defendants that if they signed the note, and so enabled him to raise the money, he would use the same for that purpose, and continue the use of the said fixtures in the building where the post office had been kept by the said F. W. Wright prior thereto. The answer further alleges that the said McBride did not use the money raised on said note for said purpose, but diverted it to other and different purposes, which other and different purposes are not stated in the answer. It is also alleged in the answer that the plaintiff had full knowl-

edge of the fact that these appellants were sureties for said McBride, as well as of the purposes for which said note was executed. It is denied in the answer that William Hefferlin ever advanced any money on said note, and it is alleged that, if any money ever was advanced on said note, it was advanced by the plaintiff as agent for William Hefferlin, who advanced it with full knowledge of the circumstances under which the note was executed, as well as of the purposes for which it was executed. As another and further defense it is alleged in the answer, upon information and belief, that from the 25th day of October, 1887, up to and until the 1st day of March, 1888, the said J. J. McBride was solvent, and in good circumstances, and able to pay said note, and, if the said note had been presented to the bank for payment, the same would have been paid, and that the defendants could have recovered the amount thereof from the said McBride; that he had sufficient property from which they could have collected the same, and that by plaintiff's laches the defendants lost their indemnity, which they would have had if the plaintiff had been diligent in collecting said note. It is alleged that on or about the 4th day of June, 1888, and prior to the time the note was presented to the bank or to these appellants for payment, the said McBride became insolvent, and absconded from the state, and that these defendants are thereby without remedy if they have to pay the note. The plaintiff demurred to the answer, whereupon the court overruled the demurrer as to the denials of the material allegations of the complaint, and sustained it as to the special defenses contained therein. Defendants elected to stand upon their answer, whereupon proof was heard as to the material allegations of the complaint and judgment entered for the plaintiff for the amount of said note. The defendants appeal from the judgment.

Campbell & Stark, for Appellants.

When the note is diverted from the purpose for which it was agreed to be used, the sureties are relieved. (*Benjamin v. Rogers*, 26 N. E. 970.) The failure of plaintiff to pre-

sent the note within reasonable time after maturity and before the insolvency of the principal, as in this case, constitutes laches and plaintiff cannot recover. (Randolph on Commercial Paper, § 893; *Craig v. Parkis*, 40 N. Y. 181; *Pain v. Packard*, 13 John. 174; *King v. Baldwin*, 17 John. 384; *Rensen v. Beekman*, 25 N. Y. 552; *Colgrove v. Tallman*, 67 N. Y. 95; *Wetzel v. Sponsler*, 18 Pa. St. 460; *Martin v. Skehan*, 2 Col. 614.)

John F. Smith, for Respondent.

Citing *Estee Pl.*, Vol. 2, § 3544; *Pomeroy's Remedies*, 2 Ed., § 673; *Bliss on Code Pleading*, 2 Ed., § 340 and § 330 N. 5; *Carter v. Moulton*, 51 Kan. 9, 32 Pac. 633, 20 L. R. A. 309; *McDonald v. Pincus*, 13 Mont. 83, 32 Pac. 283; *Comm. of Marion Co. v. Clark*, 94 U. S. 278; *Daniels on Neg. Instr.*, 3 Ed., §§ 792, 793 and 793a; *Moreland's Assignee v. Citizens' Savings Bank*, 30 S. W. 637; *Moore v. Ward*, 1 Hilt. 337, 1 Campb. 246; *Randolph on Com. Paper*, Vol. 2, 1 Ed., § 899; *Id.* Vol. 2, § 849, § 931; *Warner v. Beardsley*, 8 Wend. 194.

PEMBERTON, C. J.—The evidence is not presented in the record. The judgment recites that the court overruled the plaintiff's demurrer to the answer as to the first defense contained therein, and sustained it as to all special defenses pleaded by defendants. It also recites that thereafter the court heard the evidence on the issues raised by the complaint and first defense contained in the answer, and rendered judgment thereon for the plaintiff in accordance with the terms of the note. In the issues tried were involved the ownership of plaintiff of the note as alleged in the complaint; in other words under the issue joined as stated above, the plaintiff was required to prove the material allegations of his complaint in order to authorize a judgment, and, in the absence of the evidence, we must presume that the evidence authorized the rendition of the judgment. This disposes of all the material allegations of the complaint, and the denials thereof contained in

the answer, and leaves us the task of dealing with the special defenses contained in the answer.

The answer alleges that McBride, the principal in the note, diverted the money raised on the note from the purpose for which he obtained it, and for which purpose appellants were induced to sign the note as his securities, and that plaintiff had knowledge thereof. The answer is uncertain and indefinite, in that it does not state what McBride did with the money. But suppose he did use it for a different purpose than that for which it was obtained. How were the appellants injured thereby? It is not shown. It is not alleged that the post office fixtures were not purchased and used by McBride in the building adjoining appellants', where it seems they wanted the post office kept. 1 Daniel, Neg. Inst., 4th Ed., § 792, says: "In order to constitute a misappropriation, there must be a fraudulent diversion from the original object and design; and it is now well settled that, where a note is indorsed for the accommodation of the maker, to be discounted at a particular bank, it is no fraudulent misappropriation of the note if it is discounted at another bank, or used in the payment of a debt or otherwise for the credit of the maker." See, also, *Moreland's Assignee v. Bank*, (Ky.) 30 S. W. 637, where this doctrine is treated elaborately. We think the allegations of the answer in this respect constitute no defense.

The appellants also allege in their answer that the plaintiff was guilty of laches in presenting and undertaking to collect the note sued on as shown in the statement. This court, in *Smith v. Freyler*, 4 Mont. 489, 1 Pac. 214, where this question is fully treated, and the authorities collated, says: "It will not release a surety on a promissory note from his liability thereon, though the creditor fail or refuse to sue the principal debtor, after notice by the surety, even though at the time of such notice the principal debtor was good, and afterwards became insolvent. The surety's remedy is to pay the note, and himself sue the principal debtor." In the case at bar no such laches are alleged on the part of the plaintiff as were shown to exist in *Smith v. Freyler*, *supra*. In that

case the holder of the note refused to sue after notice to do so by the security when the principal debtor was solvent at the time, and, after notice, became insolvent. Mere delay and passivity of the creditor in presenting or collecting the debt does not discharge the surety. (2 Daniel, Neg. Inst., 4th Ed., § 1326.) We think *Smith v. Freyler, supra*, decisive of this question.

These are the only errors assigned which appellants' counsel ask us to consider. There are other assignments, but they are included in the questions treated above; and, if they were not, we think them so immaterial as not to require separate treatment. We think the matters treated above cover substantially all the errors assigned in the record. We see no error in the action of the court in sustaining the demurrer to the special defenses contained in the answer of appellants, and which we have discussed above. The judgment appealed from is affirmed.

Affirmed.

HUNT and BUCK, JJ., concur.

RICHARDS ET AL., RESPONDENTS, v. LEWISOHN BROS.,
APPELLANTS.

[Submitted January 20, 1897. Decided January 25, 1897.]

*Mechanics' Lien—Judgment on Publication of Summons—
Contents of Notice of Lien—Description of Party.*

JUDGMENT—Summons Served by Publication.—In an action to foreclose a mechanic's lien, summons was served by publication; *held*, that a personal judgment could not be entered against the defendant so served. (§ 1333, Fifth Division of the Compiled Statutes, 1887.)

MECHANIC'S LIEN—Description of Party.—The notice of lien filed by plaintiff, as well as the account, described the person for whom the material and labor were furnished and the owner of the building as "Lewisohn (whose christian name is unknown)." The action is brought against Lewisohn Bros. who are alleged to be the owners, *Held*, that the notice and claim were sufficient.

SAME—It seems that, where the name of the owner of the building is known, it should be given in full. (§§ 1371, 1372, 1373 of the Compiled Statutes, 1887, construed.)

Appeal from District Court, Silver Bow County. William O. Speer, Judge.

ACTION by Theodore Richards and Patrick Culkin, co-partners as Richards & Culkin, against Lewisohn Bros., to enforce a mechanic's lien. There was judgment for plaintiff, and defendants appeal. Modified.

Statement of the case by the justice delivering the opinion.

Foreclosure of mechanic's lien. Plaintiffs, as co-partners, allege, among other things, that defendants, Lewisohn Bros., a firm composed of persons unknown to the plaintiffs, are the owners and reputed owners of the property upon which the plaintiffs, as plasterers, performed certain work; that, to secure and perfect their lien upon the building and lands, they filed their claim, duly verified, and made part of the complaint. The exhibits attached to the complaint were marked "A" and "B." Exhibit A reads as follows:

Butte City, Montana, Dec. 26, 1892.

Lewisohn (whose Christian name is unknown)

to Theodore Richards and Patrick Culkin, Dr.

To 2,497 yards lathing, at 4 cts. per yard.....	\$ 99 88
To 187 yards lathing, at 8 cts. per yard.....	14 96
To lath patching.....	4 00

Total amount due.....	\$118 84
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Exhibit B, after reciting that the work was done as set forth in the preceding itemized statement, continued, "that said lathing, and the whole thereof, was done at the special instance and request of Lewisohn (whose Christian name is to us unknown), the owner of said building and ground on which same is situated, and the person for whose immediate use and benefit the said lathing was done," etc. Both plaintiffs verified the notice of lien and statement of account. Summons was served by publication upon the defendants, who failed to appear. Judgment was entered against them for the amount of the lien and costs, and it was decreed that the premises involved be sold to satisfy the judgment. Defendants appeal from the judgment.

C. R. Leonard, for Appellants.

Paschal & Darrow, for Respondents.

HUNT, J.—The appellants ask a reversal of this case upon the single ground that the complaint does not support the judgment. This question is properly raised on appeal from the judgment alone. (*Foster v. Wilson*, 5 Mont. 53, 2 Pac. 310; *City of Helena v. Brule*, 15 Mont. 429, 39 Pac. 456, 852; *Tracy v. Harmon*, 17 Mont. 465, 43 Pac. 500.)

Appellants first object to the judgment itself. The judgment was that the plaintiffs have and recover of the said defendants the sum of \$140.60, the amount of the lien and debt, together with costs, due from defendants to plaintiffs. It was also further ordered, adjudged and decreed that, all and singular, the premises mentioned in the complaint be sold, or so much thereof as might be sufficient to raise the amount due the plaintiffs upon said judgment, interest, and costs, and that the sheriff sell the same in manner provided by law. Inasmuch as it appears that service was had by publication, this judgment, if otherwise valid, is supported by the complaint only so far as it awards to plaintiffs a recovery of the amount of the indebtedness found to be due, and costs, to be levied out of the property charged with the lien thereof, and described in the judgment. (Compiled Statutes 1887, Div. 5 § 1383.) No personal judgment could be rendered in this state against the owners of the realty in a suit to foreclose a mechanic's lien, where the service was by publication. (Phil. Mech. Liens, § 307.) If, therefore, the judgment is otherwise supported by the complaint, it can, in this respect, be modified so that the plaintiffs may be granted that remedy which the statutes above cited grant, and that alone.

But the appellants further contend, that no judgment at all can stand in the case, because the lien does not connect Lewisohn Bros. with the ownership of the property, or with the work alleged to have been performed. The argument of counsel is that because the lien shows that the work was performed by plaintiffs for Lewisohn, whose christian name was unknown, the lien paper itself disproves the allegations of the complaint that defendants Lewisohn Bros., a firm of persons unknown to plaintiffs are the owners and reputed owners of

the lots of ground. Tested by the familiar general principle that mechanics' liens are of an entirely statutory and extraordinary nature, and that a person who strictly pursues the statute must be granted his remedy, if justly entitled thereto, we think plaintiffs properly recovered in this case.

We are not called upon to positively decide whether, under section 1371, Compiled Laws, 1887, or the amendments thereto, approved September 14, 1887 (Laws Extra Session, 1887, page 71), a notice of lien must contain the name of the owner or reputed owner of the property sought to be charged; but it would seem that, when sections 1371 and 1372 are considered together, there should be a statement of the owner's or reputed owner's name, if known to the claimant. It will be noted that sections 1371 and 1372 simply, in substance, require the filing by the claimant of a just and true account due or owing, after allowing all credits, and containing a correct description of the property to be charged with the lien, and verified by affidavit. Considered without reference to any further section of the law, it would doubtless be held, under the sections cited, that it was not essential that the name of the owner or reputed owner of the property be given. It was so held in *Hays v. Mercier*, 22 Neb. 656, 35 N. W. 894. But it is provided by section 1373 of the Compiled Laws of 1887 that the recorder of the county shall make an abstract of the lien account, in a book kept for the purpose, containing (1) the name of the claimant, (2) the amount of the lien, (3) the name of the person against whose property the lien is filed, and (4) the description of the property. The objects of having these particulars specified by the county recorder in an abstract book are to enable owners to have notice that their property is sought to be charged, and to inform them of the claims filed. *Beals v. Congregation B'nai Jeshurun*, 1 E. D. Smith, 654. Now, as the county recorder must make this abstract of the contents of the claim filed, clearly he can only secure his information for the entries from the account filed in his office; and, if this be correct, he must secure the name of the owner of the property from the lien notice itself, it would therefore

appear to be necessary that there be some statement in the notice or account of the name of the owner or the reputed owner, if known. This construction of the statutes puts the several provisions relating to the subject of lien notices in harmony with one another, and is but a reasonable imposition apparently contemplated by the law to be put upon the lien claimant.

The case in hand, however, is not one where the name of the owner was omitted in the account or statement, but one where the christian name of an alleged sole owner was left out because "unknown" to the claimants, and where the complaint filed afterwards alleged there were two owners (the one named in the account and another) whose names are unknown to the plaintiffs. So that if our views just expressed upon the necessity of naming the owner, if it can be done, are to be applied, we shall find respondents have brought themselves within the rule approved of, by naming an owner or reputed owner, and even excusing themselves from giving his christian name. The averments in the account and in the statement, which are verified, are, respectively, that Lewisohn, whose christian name is unknown, owes the account, and that the lathing was done at the request of Lewisohn, whose christian name is unknown, the owner of the building and lots. The lien notice was sufficient. It named as an owner one Lewisohn, to whom it gave notice of the claim against the property described.

The facts in the case before us are analogous to those before the court in *McPhee v. Litchfield*, 145 Mass. 565, 14 N. E. 923. There the plaintiff filed his petition to enforce a mechanic's lien. The statute provided, among other things, that the lien should be dissolved unless the petitioner desiring to avail himself thereof * * * filed in the registry of deeds a statement of a just and true account of the amount due him, with all just credits given; a description of the property * * * and the name of the owner or owners of such property, if known. The petitioner, *McPhee*, in his statement, averred that the lot of land was owned, to the best of his knowledge

and belief, by Catherine Broderick. Upon the trial it appeared that in fact the property was owned by the defendant McNamara, but the petitioner believed that the defendant Broderick was the owner when he filed his statement. The supreme court decided that it was important that the name of the owner should be given in the certificate, if it could be done, and went on to say: "But the statute contemplates that there may be cases where the name of the owner need not be given in the certificate. The name is to be given 'if known.' This implies that, if the name is not known to the petitioner, the certificate is good if it does not name the owner. In this case the petitioner did not know the owner, and thus it differs from *Kelly v. Laros*, 109 Mass. 395, and *Amidon v. Benjamin*, 128 Mass. 534. This case, then, is one where the name of the owner is unknown. If the certificate had so stated, no fault could be found with it. Does the fact that the petitioner innocently states his belief that the respondent Broderick is the owner vitiate the certificate? So to hold would be to import into the statute a provision not found there. We are of opinion that this cannot be done, especially in a case like this, where the honest mistake of the petitioner has not in any way misled or injured the respondents." The opinions of this court since the decision in *Black v. Appolonio*, 1 Mont. 342, have been in line with the approved rule which treats the mechanic's lien statute as remedial. "Such a statute," said Judge Knowles in *Black v. Appolonio*, "should be strictly pursued, while it should be liberally construed." See, also, to like effect, *Smith v. Mining Co.*, 12 Mont. 524, 31 Pac. 72. The statute of California requires the statement in the claim of lien to give the name of the owner or reputed owner, if known. In *Lumber Co. v. Newkirk*, 80 Cal. 275, 22 Pac. 231, where plaintiff sued to foreclose a mechanic's lien, the complaint charged that the claim filed stated the name of E. B. Newkirk as owner and reputed owner of a leasehold interest in the property to be charged, and stating in the lien that the owner of the fee was unknown. The court there said: "This averment shows a compliance with the require-

ment of the statute above quoted. It is substantially an averment that it was stated in the claim filed that neither the name of the real owner nor of the reputed owner was known to the plaintiff when he filed his lien. The plaintiff is only required to state the names mentioned, if known. If the names are not known, the claim filed is sufficient if it is silent on this subject." Surely, if the claim need aver nothing on the subject of ownership where the owner's name is unknown, an honest omission to give the christian name of an owner, and to include another owner by the same surname, because unknown, ought not to be fatal to the lien, where the complaint contains sufficient averments of the names, or gives an excuse for not making them more specific. (Jones on Liens, § 1400; Phil. on Mechanic's Liens § 345.) This doctrine appeals to reason, and finds high authority to sustain it in the case of *Cleverly v. Moseley*, 148 Mass. 280, 19 N. E. 394, where the claimant's statement averred that the lot, to the best of his knowledge and belief, was owned by Herbert Moseley. It turned out on trial that Herbert Moseley was not the owner. Upon the objection to the statement, it was held that while, to conform to the law, the owner's name should always be given in the statement, if possible, the omission of it, or a mistake in it, if it is not known to the claimant, is not necessarily fatal to the lien. The opinion adds the following: "An incumbrance created by filing a statement claiming a lien can in no event remain long before the lien is enforced by proceedings in court. The possible existence of such an incumbrance is commonly suggested by the condition of the property so far as to put purchasers upon inquiry, and the statute contemplates that one examining a title may find it necessary to look beyond the names indexed in the register, to the descriptions of the lands in the statements recently filed." Whether or not the complaint in the case before us should have been more definite in its allegations concerning the statements of ownership in the lien is not material. The only question we are to pass upon is whether it supports the judgment. Our conclusion is that it does, but that the decree should be modified as hereinbefore discussed.

The case is therefore remanded for modification of the decree as indicated, and when the decree is so modified it will be affirmed.

Affirmed.

PEMBERTON, C. J., and BUCK, J., concur.

MULLIGAN, RESPONDENT, v. MONTANA UNION RAILWAY CO., APPELLANT, and FEATHERKILE v. SAME.

[Submitted January 7, 1897. Decided February 1, 1897.]

Master and Servant—Practice on Motion for New Trial—Instructions—Fellow Servants.

19	135
24	169
19	135
25	512
19	135
441	154
19	135
40	411
40	617

MOTION FOR NEW TRIAL.—Where the notice of intention to move for a new trial does not specify "the insufficiency of the evidence, etc.," as one of the grounds of the motion, the verdict cannot be disturbed upon that ground.

MASTER AND SERVANT—Duties of the former—Instructions.—Instructions must be considered as a whole; and where instructions are given which contain the correct rule as to the duty of the master to furnish suitable machinery and inspection of the same the verdict should not be reversed because another instruction may not give the law on that subject fully.

SAME.—There is no error in charging the jury in such a case that plaintiff could not recover, if his own negligence directly contributed to his injury.

SAME.—The engineer of a locomotive and the fireman are fellow servants, and it was not error to charge that the latter could not recover from the company for an injury caused by the negligence of the former.

Appeal from District Court, Silver Bow County. J. J. McHatton, Judge.

ACTIONS by H. B. Mulligan and J. F. Featherkile against the Montana Union Railway Company. From an order in the Mulligan case sustaining plaintiff's motion for a new trial, defendant appeals. Reversed.

Statement of the case by the justice delivering the opinion.

These cases were both for the recovery of damages for personal injuries. The plaintiff (respondent) Mulligan was a fireman upon the defendant (appellant) railroad company's road. The plaintiff Featherkile was an engineer. Both were injured

at the same time, and by stipulation of counsel for all parties the causes were tried together before the same jury, with the agreement that the jury should render separate verdicts. The plaintiff Mulligan's case is brought before the supreme court by appeal. The allegations of the complaint are that, on March 18, 1893, plaintiff was a fireman in the employ of the defendant company; that, at about 4 o'clock a. m. of said day, while the engine upon which he was firing was about three-fourths of a mile from the point to which said engine was going, the engineer in charge stopped the engine to pack the piston upon the right side to prevent steam from escaping from the piston, owing to the defective condition thereof and to the want of packing in said piston; that, while the engine was standing still as aforesaid, it exploded, very seriously injuring him. It was alleged that the engine, at the time of the injury and for a long time prior, was in a dangerous and defective condition; that the engine had no crown bars, and that, if there ever had been any, they had been removed by defendant; that the flue sheet was cracked in several places; that many of the stay bolts in the crown sheet were broken, and drawn out, and in a defective condition, and had been so for a long time prior to the accident, leaving the crown sheet without a sufficient support to withstand the strain and heat thereon; that the crown sheet had no safety plug, and that the engine was generally defective, and had not been put or kept in proper repair, all of which defects and defective condition were and had been known to defendant company for a long time prior to the accident; that the explosion and the injuries to the plaintiff were caused solely by reason of the defective condition of said engine and boiler, and by reason of carelessness and negligence of the company in permitting the engine and boiler to become defective, and in carelessly and negligently using the engine and boiler in such defective condition with full knowledge and notice of the condition thereof, and in causing this plaintiff to work thereon without giving him any warning. The plaintiff alleged that he had no knowledge or notice, before the injury, of the dan-

gerous and defective condition of the engine. The answer denied every material allegation of the complaint pertaining to negligence or to the defective condition of the locomotive. The defendant then pleaded that plaintiff and the engineer were fellow servants and that the accident was caused by the engineer's permitting the water in the boiler to become so low that the crown sheet became hot and dry, and that the plaintiff and the engineer carelessly injected water into the boiler while the crown sheet was so heated, and that this water was converted into steam, thereby causing the explosion. Defendant company denied that it had any knowledge of any defect in the engine, and alleged that, if it was defective, it was the duty of plaintiff to report the defects, but that plaintiff never made any report of the defects in the said engine; that plaintiff was employed to work on the engine, and, if it was defective in the respects alleged, or in any respect, the said defects were apparent and known to the plaintiff, and that plaintiff continued to work on said engine without complaint; and defendant averred that it was not aware and did not know of any defects in said engine. The replication denied the new matter in the answer. The plaintiff also denied that the defects were apparent and known to him, and further alleged that, during the short time he was employed upon said engine, there was no way by which he could have detected such defects and made complaint to the defendant and declined to work thereon. The cause was tried to a jury, and a verdict rendered for the defendant. Judgment was entered on the verdict for the defendant for the costs. The plaintiff moved for a new trial, and the court sustained this motion. The defendant appeals to this court from the order of the district court sustaining the motion for a new trial.

Geo. Haldorn, for Appellant.

HUNT, J.—The plaintiffs (respondents) have not seen fit to appear by counsel or by brief in this court. We have, nevertheless, examined all the errors specified by respondent Mulligan in his motion for a new trial, to determine whether any of

them were well taken, and justified the lower court in granting the motion. In this examination, however, we have been precluded from considering the testimony, because the plaintiff did not base his motion for a new trial upon the insufficiency of the evidence to sustain the verdict in favor of the railroad company, or upon any other possible errors based upon rulings on the evidence, but relied entirely upon alleged errors committed in the court's instructions to the jury. (*Raymond v. Thexton*, 7 Mont. 299, 17 Pac. 258.)

The first instruction assigned as erroneous substantially told the jury that, if plaintiffs directly contributed to their own injuries by their own negligence, they could not recover, even if the defendant was negligent. This is the general elementary doctrine of contributory negligence, laid down by text writers and sustained by the decisions of this court. (*Beach on Contributory Negligence*, § 14; *Hamilton v. Railway Co.*, 17 Mont. 334, 42 Pac. 860, and 43 Pac. 713.) We see nothing of record to take this case out of the general rule.

The next error assigned is that the court instructed the jury that defendant was not obliged to furnish the plaintiffs with the newest or latest improvements in construction upon the engine, but that all the law required was that defendant furnish plaintiffs with reasonably safe machinery and appliances, and that, if the jury believed from the evidence that the boiler of the locomotive was a good boiler of the kind, and in good repair, then plaintiffs assumed the risks incident to their employment, notwithstanding the jury's belief that a boiler of different construction would have been safer. This instruction must be considered with reference to several others, wherein the court expressly told the jury that the duty of the master is to use ordinary care to furnish suitable and safe machinery and appliances, and to keep the same in good repair, and to make all needed inspection and examination of the machinery and appliances, with a view of keeping the same in repair, and that a failure to do so would render him liable to the servant injured by reason of the omission of the master to properly perform these duties. The instructions on this point

were in accord with our recent decision in *Johnson v. Mining Co.*, 16 Mont. 164, 40 Pac. 298, where, in discussing the meaning of the words "ordinary care," we said: "And so we find the opinions, in discussing the definition of 'ordinary care,' recognize that no fixed, arbitrary rule can be laid down, but that the degree of care and vigilance required varies according to the exigencies which require attention and vigilance, conforming in amount and degree to the particular circumstances under which they are to be exercised. The care and attention necessary on an employer's part in furnishing a steam boiler is relative to the work to be done by the boiler, and the capacity of such an instrument for harm as well as good. * * * The employer is in duty bound to see that the machinery is fit and safe for the work only so far as due and reasonable care and diligence and prudence will go towards having it and keeping it safe and fit. He is not a warrantor of the safety of the machinery, and, when he has exercised the degree of care hereinbefore discussed as ordinary or reasonable, his duty is done. (Wharton on Negligence, § 211.)"

Error is also assigned because the court charged that the engineer and fireman were fellow servants, and, if the fireman was injured by reason of the engineer's negligence, plaintiff could not recover. This is the law generally, as laid down by the supreme court of the United States, cited and followed by this court in the following cases, by which we feel bound: (*Goodwell v. Railway Co.*, 18 Mont. 293, 45 Pac. 210; *Hassings v. Railway Co.*, 18 Mont. 493, 46 Pac. 264.)

The remaining error assigned by respondent is predicated upon the following instruction: "The jury are instructed that a servant, when he engages in a particular employment, is presumed to do so with a knowledge of its ordinary hazards, whether from the carelessness of fellow servants in the same line of employment, or from latent defects in the machinery and appliances used in the business, or the ordinary dangers of the use of the same, and the law presumes that, when he enters into such employment, he assumes all such risks; and

if, in this case, you believe, from the evidence, that the accident in question was occasioned by any latent defect in the machinery, or that it was occasioned by the negligence of the plaintiff or his fellow servant, then you are instructed that the plaintiff cannot recover in this case, and you should find for the defendant." The appellant's brief advises us that the last foregoing assignment of error was the only one pressed upon the consideration of the court below, when the motion for a new trial was argued. We further infer, from appellant's brief, that the particular objection urged was that the jury were misled by not having before them some explanation of the meaning of the words "latent defects" in the machinery. But, when the instructions are considered as a whole, the force of this objection is lost, because they were told elsewhere as follows: "I further instruct you that if you find, from the evidence in this case, that the boiler in question in this case exploded without any fault on the part of the plaintiffs, or either of them, and that such explosion was caused by defects in the boiler, as alleged in plaintiffs' complaint, which the agents of the defendant, charged with the duty of keeping it in repair, knew of, or by the use of ordinary care ought to have known of, and that plaintiffs were injured by such explosion, then I instruct you that each of the plaintiffs will be entitled to recover of the defendant such damages as will compensate him for such injury, not exceeding the amount claimed in his complaint." Examining these two instructions, we find that by one the jury were told that, if the explosion was not caused by any fault on the part of plaintiffs, but was caused by reason of any of the defects named in the complaint, and which the defendant knew of, or by exercise of ordinary care and prudence ought to have known of, the plaintiffs could recover, while by the other they were told that the defendant was not liable for accidents arising by reason of latent defects in the machinery and appliances used. We take it to be the law that, if the master can only be held to the use of ordinary care and prudence in furnishing safe machinery to the servant and keeping the same in proper repair, but that he cannot be

held as a warrantor of the safety of the machinery, it reasonably follows that the master is not liable to the servant for latent defects in the machinery or tools furnished which ordinary inspection and exercise of ordinary care would not or has not detected. Now, when this doctrine is applied to the two instructions quoted above, we find the one practically explanatory of the term "latent" used in the other, and that the doctrine and significance of patent and latent defects and dangers, incidental to the plaintiff's employment, was sufficiently laid before the jury. The respondents did not ask the court to instruct the jury more fully, or at all, so far as the record advises us, upon "latent defects," and they cannot now complain because the instructions that were given did not more fully state the law.

Our judgment is that the respondents' rights were not prejudiced by the instruction of the court, and that, upon review of all the assignments of error, the charge conformed to the material issues raised by the pleadings. It follows that we discover no sufficient ground upon which to sustain the action of the district court in granting a new trial to plaintiff. It is therefore ordered that the order granting a new trial be reversed.

Reversed.

PEMBERTON, C. J., and BUCK, J., concur.

DAVIS, RESPONDENT, v. MORGAN, CONSTABLE,
APPELLANT.

[Submitted January 26, 1897. Decided February 1, 1897.]

19	141
122	388
223	477
22	478

*Conversion—Fraudulent Conveyance—Instructions, Evidence,
Attorney and Client.*

FRAUDULENT CONVEYANCE—Instructions—Action for conversion.—The defendant, a constable, justified under an execution against plaintiff's grantor, alleging that the sale was a conspiracy to defraud the creditors of the vendor, to which plaintiff was a party; evidence tending to sustain this defense was introduced. *Held*, that it was error to refuse a request for an instruction that "if the jury believe from the testi-

mony that the sale * * * was not made in good faith, but was made for the purpose of hindering and defrauding the creditors of Mrs. Meyers, then your verdict should be for the defendant ; " and this error is not cured by a charge to the jury concerning ownership, but which does not refer to the *bona fides* of the sale.

SAME—Evidence—Cross-examination.—It was proper to sustain objection to questions upon cross-examination of plaintiff's witnesses asked for the purpose of proving the affirmative defense set up in the answer.

ATTORNEY AND CLIENT.—M testified that he consulted S as an attorney; S advised M but did not consider himself as the attorney of M and did not charge any fee for his opinion. *Held*, that the testimony of S concerning the conversation of M at the time was properly stricken out, for the reason that the evidence established the relation of attorney and client.

Appeal from District Court, Cascade County. C. H. Benton, Judge.

ACTION by W. H. Davis against W. M. Morgan, as constable, for conversion of property. Judgment for plaintiff, from which, and from an order denying a motion for a new trial, defendant appeals. *Reversed.*

Statement of the case by the justice delivering the opinion.

Conversion charged against the defendant by the plaintiff because of the wrongful acts of the defendant in taking a stallion from the possession of the plaintiff. The defendant denied plaintiff's ownership and interest in the horse, and pleaded a justification by virtue of a sale of the horse made pursuant to judgment and execution in a suit against Della May Meyers, by Rhubottom & Gilchrist. The defendant also pleaded that plaintiff, who was a brother of Della May Meyers, and A. D. Meyers, the husband of Della May Meyers, conspired with Della May Meyers to prevent the said Rhubottom & Gilchrist from collecting their debt, and that plaintiff's claim to the horse was fraudulent, and was made with intent to hinder and delay the creditors of said Della May Meyers, and especially the firm of Rhubottom & Gilchrist, and that plaintiff has no right, title, or interest in the horse. The case was tried to a jury, and a verdict and judgment rendered for plaintiff. The defendant moved for a new trial, which motion was denied. The appeal is from the judgment and the order denying the motion for a new trial.

Largent & Huntton, for Appellant.

W. G. Downing, for Respondent.

HUNT, J.—There was testimony introduced on the trial to the effect that W. H. Davis, plaintiff herein, and Della May Meyers were brother and sister, and that on October 16, 1894, Mrs. Meyers sold to plaintiff, in consideration of \$300, the horse in question. At the time of this alleged sale, Mrs. Meyers executed a written bill of sale to plaintiff. The horse appears to have been delivered to plaintiff, Davis. Upon January 8, 1895, Rhubottom & Gilchrist sued Della May Meyers in a justice's court to recover the sum of \$55 for some work and labor done by them for her in April, 1893, and recovered judgment therefor on January 12, 1895. Under an execution issued from the justice's court, Morgan, the defendant, as constable, levied upon the stallion as the property of Mrs. Meyers, and sold him for the sum of \$90. Upon January 30, 1895, Della May Meyers executed to the plaintiff, W. H. Davis, a second bill of sale of the horse. No property was included in this last bill of sale except the horse in question; the only difference between the two being that the second one was more formal in its recitals, and contained a more complete description of the animal. The testimony of plaintiff, Davis, was substantially that he had bought the horse from Mrs. Meyers, and that the reason for the execution of the second bill of sale was to cure any possible defects in the legal form of the first, but that he had owned and been in possession of the horse from the time of the execution of the first bill of sale. The defendant, on the other hand, offered testimony tending to prove that in the latter part of December, 1894, the plaintiff, Davis, had stated, in response to a question put to him by a person who wished to buy the horse for a man at Cascade, that he did not own the horse; that his sister, Mrs. Meyers, owned him, but that he thought he could be bought cheap. The purpose of this testimony was plainly to sustain the allegations of defendant's answer that the plaintiff's claim to the horse was made with intent to hinder, delay, and defraud the creditors of Della May Meyers, and for such pur-

pose it was clearly admissable, and properly went to the jury. In accordance with this theory of the defense, the court was asked by defendant to instruct the jury, among other things, as follows: "If you believe from the testimony that the alleged sale of the horse in question to the plaintiff by Mrs. Meyers was not made in good faith, but was made for the purpose of hindering, delaying, and defrauding creditors of the said Mrs. Meyers, then your verdict should be for the defendant." The court refused to give this instruction, and this refusal is assigned as error. The assignment is well founded. In the charge of the court the jury were told that if they believed that, at the time the defendant levied upon the horse, plaintiff was not the owner, then their verdict should be for the defendant, while, if they found that plaintiff was the owner, their verdict should be accordingly. But, aside from this general charge upon the question of the ownership of the horse, there is no reference anywhere throughout the instructions made by the court upon the issue of the *bona fides* of the transaction between the plaintiff and his sister, Mrs. Meyers. It is easy to see how the jury may have been misled by this omission of the court, because they may have believed that the delivery of the horse, of itself, and possession by plaintiff, constituted ownership, regardless of whether or not such a transfer was fraudulent, and made solely with a view to defeat the collection of the judgment held by Rhubottom & Gilchrist.

As the case must be tried again, we will very briefly indicate our views upon several other errors assigned by the appellant.

Upon the cross-examination of several witnesses, the defendant asked several questions for the purpose of making out the conspiracy alleged in his answer. Objections to all such questions were sustained by the court for the reason that they were not proper cross-examination. We think the court ruled properly in this matter. Fraud and conspiracy were affirmative defenses, and it was incumbent upon the defendant to introduce testimony of his own to sustain these allegations, and

it was improper for him to attempt to prove his affirmative averments in these respects by cross-examination of plaintiff's witnesses.

Testimony was introduced by defendant tending to show that Mr. Meyers, the husband of Mrs. Meyers, consulted Samuel Stephenson, Esq., an attorney at law at Great Falls in relation to how the horse could be transferred in order to escape a levy of execution by Rhubottom & Gilchrist, who had a judgment against Mrs. Meyers. Mr. Stephenson himself says that he advised Meyers, but that he did not consider this consultation and advice such as to constitute the relation of attorney and client, that nothing was said about a fee, and that he did not regard himself as Mr. Meyers' attorney when he did advise him in relation to the matter. Meyers says however, that he did consult him as a lawyer, and for the purpose of securing his professional opinion of how to transfer another and entirely different horse. The court struck out the testimony of Stephenson on the motion of plaintiff, based upon the ground that the relation of attorney and client existed between Stephenson and Meyers at the time the communications testified to were made. In this action of the court we find no error, for we think it sufficiently appears from the testimony of Mr. Stephenson himself that the communications made by Mr. Meyers to him, and his advice thereon, were had and given in the course of professional employment, and that, therefore, he could not be examined as to any such communications or advice without the consent of his client Meyers. (Code of Civil Procedure, § 3163, subd. 2.) There can be no question that Meyers communicated with Stephenson so as to obtain from him the advice of one possessed of knowledge of the law. He wanted the opinion of a lawyer, and of how to legally protect the horse in question, or some other horse, from seizure. He therefore naturally went to one whose profession qualified him to give the proper advice, and Mr. Stephenson gave him his opinion. It is true that Mr. Stephenson disclaims having acted in a professional capacity, but from the undisputed facts, the court correctly

decided that the relation of counsel and client existed. The omission to pay a fee is not the only test of whether such a relation may have existed. As said by the court of appeals in New York in *Bacon v. Frisbie*, 80 N. Y. 394 : "It matters not that he paid no immediate fee; nor that suit was then pending, or then contemplated. Communications made to an attorney in the course of any personal employment, relating to the subject thereof, and which may be supposed to be drawn out in consequence of the relation in which the parties stand to each other, are under the seal of confidence, and entitled to protection as privileged communications. (*Williams v. Fitch*, 18 N. Y. 551.) All communications made by a client to his counsel for the purpose of professional advice or assistance are privileged, whether they relate to a suit pending or contemplated, or to any other matter proper for such advice or aid. (*Britton v. Lorenz*, 45 N. Y. 51.) And, whenever the communication made relates to a matter so connected with the employment as attorney or counsel as to afford presumption that it was the ground of the address by the client, then it is privileged from disclosure. (*Turquand v. Knight*, 2 Mees. & W. 98.)" The judgment and order appealed from are reversed, and the cause is remanded for a new trial.

Reversed.

PEMBERTON, C. J., and BUCK J., concur.

BECKSTEAD, RESPONDENT, v. MONTANA UNION R. R.
CO., APPELLANT.

[Submitted January 28, 1897. Decided February 1, 1897.]

Fence Law—Constitutionality—Conflict of Evidence.

FENCE LAW—Constitutionality.—The act of 1891, page 267, requiring railroad companies to fence their roads with fences "suitable and amply sufficient to prevent live stock from getting thereon," or else to respond in damages for animals killed or injured, except when "occasioned by the wilful act of the owner or his agent," is not unconstitutional.

SAME—Evidence.—The complaint alleged that plaintiff's cattle strayed upon defendant's railroad track by reason of an insufficient fence and had been killed by a moving train; the answer alleged that the cattle had strayed upon the track through a gate left open by plaintiff; this was denied in the replication; the evidence was conflicting as to whether or not either the fence or the gate was sufficiently strong, and as to whether the gate was open; it did not appear from the evidence that the gate was left open by plaintiff; or by any one else; and the court instructed the jury that the plaintiff could not recover if the gate was left open by any one other than the defendant. *Held*, that the evidence being conflicting and supporting the allegation that both the fence and gate were insufficient, the order denying the motion for a new trial will be affirmed.

Appeal from District Court, Deer Lodge County. Theo. Brantly, Judge.

ACTION by A. Beckstead against the Montana Union Railway Company to recover damages for the killing of plaintiff's stock. From a judgment for plaintiff, and from an order denying a motion for new trial, defendant appeals. Affirmed.

Statement of the case by the justice delivering the opinion.

This action was instituted under the law of 1891 (Acts Second Legislative assembly, page 267), requiring railroad companies to fence their roads with fences "suitable and amply sufficient to prevent live stock from getting thereon," or else to respond in damages for animals killed or injured, except when "occasioned by the wilful act of the owner or his agent." Said law also allows double the damages when not paid within 30 days after notice thereof. The complaint alleged that four head of cattle belonging to plaintiff (respondent) had strayed

upon defendant's (appellant's) track, by reason of an insufficient fence, and been killed by a moving train; also, that defendant had not paid the damages sustained within 30 days after written notice. The answer contained an admission of the nonpayment of damages, certain denials, and alleged affirmatively that the cattle had strayed upon its track through a gate left open by plaintiff. The replication denied the contributory negligence. The trial resulted in a verdict for plaintiff, and from the order denying the motion for a new trial, and the judgment, defendant appeals.

George Halborn, for Appellant.

Napton & Napton, for Respondent.

BUCK, J.—This appeal was submitted on briefs. Appellant asks for a reversal only on the grounds that the act of 1891 is unconstitutional, and that the evidence shows plaintiff was guilty of contributory negligence, as alleged in the complaint. The brief filed in its behalf is silent as to any error committed by the lower court in instructing the jury or ruling on the evidence. From the record it clearly appears that there was a conflict as to whether the fence was a sufficient one under the statute, and as to whether the cattle had broken through the fence, or gone upon the track through an open gate. It does not appear that the gate was left open by the owner of the cattle or any one else. The court instructed the jury that if the gate had been left open by any one other than defendant, and from such negligence the cattle were killed, plaintiff could not recover. The jury evidently found that the cattle had broken through the fence. There was ample evidence to support the verdict on the ground of the insufficiency of the fence. There was also evidence to show that the gate was an insufficient one. Under these circumstances, the rule as to a conflict in the evidence must control, and the authorities cited by appellant as to contributory negligence are inapplicable. We hold the law constitutional. It is substantially the Iowa statute on the same subject. Its

constitutionality has been upheld in the following cases: *Railway Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. 207; *Bennett v. Railway Co.* 61 Ia. 355, 16 N. W. 210. The judgment is affirmed.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

STATE, EX REL. GIROUX, RELATOR, v. GIROUX,
RESPONDENT.

19 149
24 52

[Submitted January 21, 1897. Decided February 1, 1897.]

Habeas Corpus—Evidence—Judgment of a Sister State—Control of Children.

HABEAS CORPUS—Evidence.—A proceeding in *habeas corpus* is summary and unsubstantially technical rules of evidence should not control.

SAME.—In this proceeding, most of the evidence was in the form of depositions; *held*, that under such circumstances, the appellate court would review the deposition; and *held*, accordingly, that the evidence fairly showed a personal service of summons in the action hereinafter referred to.

JUDGMENT OF SISTER STATE.—A judgment of a sister state can be attacked for want of jurisdiction of the person of the defendant; but where such judgment is obtained upon personal service of summons within the jurisdiction of the court, it cannot be attacked collaterally for fraud, and the fact that defendant was not within the jurisdiction of the court, at the time the decree was entered, does not change the rule.

EVIDENCE.—Error cannot be based upon a refusal to admit in evidence a judgment which was subsequently allowed to be introduced.

HABEAS CORPUS—Custody of children.—At common law where the father and mother are equally fitted for the care of their child, the right of the father is superior.

SAME—Evidence—Opinion.—A witness cannot give his opinion as to whether the father or mother is the more suitable custodian of their minor child.

Appeal from District Court, Flathead County. Charles W. Pomeroy, Judge.

APPLICATION by the state, on the relation of Joseph L. Giroux, for a writ of *habeas corpus* against Rebecca Giroux. From a judgment for defendant, plaintiff appeals. Reversed.

Statement of the case by the justice delivering the opinion.

This appeal is the result of a *habeas corpus* proceeding in

the district court of Flathead county for the custody of a minor child withheld by its mother from the father. The facts are substantially as follows :

Joseph L. Giroux and the respondent, Rebecca Giroux, were married in Montana in 1884, and soon thereafter removed to Arizona, of which territory Joseph L. Giroux is now, and was at all times hereinafter mentioned, a resident. On June 11, 1893, the respondent, Rebecca Giroux, left Arizona to spend the summer with relatives in Montana, taking with her the issue of said marriage—a boy, George L. Giroux, aged at the time six years, and a girl, Virginia Giroux, aged five years. On June 19, 1893, Joseph L. Giroux, in a district court of Arizona, commenced an action against the said Rebecca Giroux for a divorce, alleging as grounds therefor drunkenness, improper intimacy with another man, and cruel treatment on her part. In the complaint he prayed the court for the care and custody of the minor children aforesaid. Receiving intelligence of the institution of the said suit, Mrs. Giroux at once returned to Arizona from Montana, and was personally served with the summons in said suit. The validity of the service of said summons she questions, as will hereinafter appear. On the 8th day of July, 1893, an agreement of separation was entered into between the husband and wife. The said agreement recites that: “Whereas, the said parties have separated, and are now living separate and apart, and a suit for divorce has been instituted by the said party of the first part (Joseph L. Giroux) against the said party of the second part (Rebecca Giroux), which said suit is now pending in the district court of the Fourth judicial district of the territory of Arizona, in and for the county of Yavapai; and whereas, the said parties are desirous of arranging their property rights without litigation, and of providing for the custody, care, maintenance, and support of their children: Now, therefore, in consideration of the premises, and the sum of one dollar to each by the other paid, it is hereby mutually agreed by and between said parties as follows, to-wit: First. That the said first party

shall and will pay to the second party the sum of \$4,300 in cash, the same to be paid on the 8th day of July, 1893, and that the said second party shall and does hereby accept said sum of \$4,300 in full of all her right, title, share, and interest in and to the community property belonging to said parties, in full alimony, and in full of all her right, title, and interest in and to any and all property owned by said first party. Second. The said first party is to have the custody, care, and control of their infant son, George L. Giroux, and the second party is to have the custody, care, and control of their infant daughter, Mossie Virginia Giroux." This agreement was duly acknowledged before a notary public, whose certificate is attached thereto. Immediately after the agreement was entered into, Mrs. Giroux returned to Montana, where on July 26, 1893, she wrote the following letter to a Mrs. Murry: 'Kalispell, Mont., July 26, 1893. Mrs. Murry, Jerome, Arizona. Dear Friend: I hope you will excuse me for not writing to you sooner, but I have been so very busy since I have come back. I am getting George ready to go back and live with his father, while I have the custody of Virgie. I got a third of what Joe had, and can live very comfortably on that. My conscience is perfectly free from guilt. Clara has caused me a very great deal of trouble. I never would have another girl around me. She says that Barton promised to marry her if she would tell Joseph all those horrible things, and help to separate Joseph and I. They have accomplished what they wanted, and I hope they are happy. I would like to know what their object was in doing so. I have sent Clara away to Spokane, I don't want to ever see her again. I will close for this time, and please write and tell me all the news. From your friend, Rebecca Giroux."

On July 17, 1893, after the departure of Mrs. Giroux for Montana, the Arizona court granted Joseph L. Giroux a decree of divorce on the grounds relied on in the complaint. It awarded the custody of the minor child, George L. Giroux, to the father. In his petition for a writ of *habeas corpus*,

Joseph L. Giroux sets forth the agreement for separation, and the Arizona decree of divorce aforesaid. In her amended return to the writ, Mrs. Giroux denies that any decree of divorce was ever obtained against her; denies that she ever appeared in the divorce suit, and alleges that, if she ever was served with summons therein, it was through fraud and deceit practiced upon her by her husband and others acting in his behalf. The details of said fraud are alleged substantially as follows: Mrs. Giroux's first knowledge of the decree of divorce was obtained when proceedings in *habeas corpus* were instituted for the custody of the boy. Her husband persuaded her to make a visit to Montana for the purpose of spending the summer there. Shortly after her arrival she received intelligence that a divorce suit had been instituted against her, and thereupon at once returned to Arizona. Arriving there, she immediately proceeded to the office of the clerk of the court, and demanded copies of all the files in the divorce action. These were not furnished to her at the time of the demand, but on July 5th she was handed a package of papers by an unknown person who informed her that they were the papers she had requested of the clerk. If any summons or copy of summons was ever delivered to her, it was in this package of papers. She did not examine the contents of said package at the time, but proceeded at once with it to her husband. When she showed and handed him the papers, he expressed regret for his action, and a desire for reconciliation, burned the papers, and told her he either had or would dismiss the divorce suit. Shortly afterwards, through misrepresentations as to its contents and the necessity for it, he induced her to sign the agreement for separation (heretofore set forth), and then induced her to return to Montana; alleging as a reason therefor that she and the children should remain away from Arizona until the scandal of the divorce action had blown over; telling her, also, that when it had, he would come and bring them back. She also set forth in her return or answer "that, at the time of the rendition of the pretended decree of divorce, she and the boy, George L. Giroux, were absent, and without the juris-

diction of the territory of Arizona, and residing within the state of Montana, and were so residing therein at the time of the institution of the divorce proceedings, and at all times subsequent thereto; that she is the natural guardian of George L. Giroux; that he and his sister, who are greatly attached to each other, should not be separated during their earlier life; that she is amply able to care for and educate said George L. Giroux; and that she is a fit and proper person to have the care and custody of him." She alleges "that the said Joseph L. Giroux, is wholly unfitted for the care and custody of the said George L. Giroux, on account of his surroundings, business, and habits of life, inasmuch as he must rely wholly upon strangers to care for the said child, as his duties demand his presence away from home during the greater part of his time, and that the said Joseph L. Giroux on or about the 8th day of October, 1893, remarried with one Phœbe Marcutt, and that, if the custody should be awarded to the father, the boy would be placed in charge of a stepmother, whom the respondent is informed and believes has no experience in the care and custody of children, and who is unable to speak the English language, and who is entirely unfit, both by nature and education, for the care of said George L. Giroux." Joseph L. Giroux, in his replication to the return or answer of the respondent, specifically denies all charges of fraud and deceit; admits his marriage to Phœbe Marcutt, but denies that, if awarded the custody of the child, he would place him in the care of a stepmother; denies that his second wife has no experience in the care and custody of children, and that she is unable to speak the English language, and avers, on the contrary, that she is an educated American lady, who speaks the English language, and has had experience and is familiar with children, is of a kind and affectionate disposition, and fond of the society of children; denies any unfitness on his part for the care or custody of said child, but avers that he is well fitted for such custody, and is abundantly able and willing to rear and educate said child in a manner fitting his station in life. He admits that, at the time of the institution of the suit and the

rendition of the decree of divorce set up in his petition, the child, George L. Giroux, was temporarily within the state of Montana, and that he has remained there since that time. The trial of the issues resulted in a judgment awarding the custody of the child George L. Giroux to his mother until the further order of the court, and defendant relator, Joseph L. Giroux, appeals.

W. F. Nossinger and F. H. Nash, for Relator.

The agreement entered into between the appellant and the respondent as to the custody of the children and division of their property rights, was a perfect and legal instrument under the laws of Arizona territory and conclusive of the rights of the parties; unless in a case where it would be manifestly against public policy and reason for the child to remain under the custody of the one entitled to it under the contract. (*Dumain v. Gwynne*, 10 Allen (Mass.) 270; *Byrne v. Love*, 14 Texas 81; *State v. Rewff*, 29 W. Va., 751; *Bonnett v. Bonnett*, 61 Iowa 199.) The judgment in evidence is conclusive as to the matters in controversy. (*Christmas v. Russell*, 5 Wall. 290; 2d Vol. Freeman on Judgments, § 563; *Morrill v. Morrill*, 23 Am. St. Rep. 95; 2 Bishop on Marriage, Divorce and Separation, § 1139; *State v. Bechdel*, 5 Am. St. Rep. 854; *Miner v. Miner*, 11 Ill. 42; *Hewitt v. Long*, 76 Ill. 399; *Hoffman v. Hoffman*, 15 O. St. 427; *Williams v. Williams*, 13 Ind. 523; *Dubois v. Johnston*, 96 Ind. 6; *Wakefield v. Ives*, 35 Iowa 238.)

Henry W. Heideman and G. H. Grubb, for Respondent.

The doctrine that foreign judgments, or judgments of sister states, are always open to attack upon the question of jurisdiction, is too well settled to require more than a passing notice here. (*Thompson v. Whitman*, 18 Wall. 457-471; *Rose v. Himely*, 4 Cranch 241; *Elliott v. Piersol*, 1 Pet. 328; *Christmas v. Russell*, 5 Wall. 293; *Dunlap v. Cody*, 31 Iowa 260; *Luckenback v. Anderson*, 47 Pa. St. 123; *Jackson v. Jackson*, 1 Johns. 424; *Borden v. Fitch*, 15 Johns. 121; *Bu-*

ford v. Buford, 4 Munf. 241; *Davis v. Headley*, 22 N. J. Eq. 115.) But our contention is that such a judgment, in fixing the custody of the children is *res adjudicata* only of the questions passed on—that is, up to the time of the rendition of the judgment. (*State v. Bechdel*, 37 Minn. 360; Church on Habeas Corpus, page 576 and note; *In re Bort*, 37 Am. Rep. 255; *Kentzler v. Kentzler*, 28 Am. St. Rep. 21; *People ex rel Allen v. Allen*, 105 N. Y. 628; Church on Habeas Corpus, § 82.) And where a child has been removed from the jurisdiction of the court that has by decree fixed its custody, to another state, the courts of that state have jurisdiction to again fix the custody of the child, without regard to the former decree. The child having been lawfully brought into the new jurisdiction, becomes the ward of the court which has power to provide it with a proper guardian. (Cooley on Cons. Lim., page 499; Church on Habeas Corpus, § 82.)

BUCK, J.—The record in this proceeding is unnecessarily voluminous, and bristles with exceptions to the admission or refusal to admit testimony. Many of these exceptions, also, are of so frivolous a nature that they have been ignored, not only in the arguments and briefs of counsel, but in the specification of errors itself. A proceeding in *habeas corpus* is summary in its character, and we feel it our duty to vigorously condemn any unnecessary impeding of this, its essential function, by technical and hypercritical criticism in reference to the admission of any evidence tending to enlighten the trial court. This is true despite any distinction of procedure or testimony to be observed in the case of a writ obtained by a parent to test the right to the custody of his child, and one issued to decide whether the petitioner is illegally deprived of his liberty. Mr. Church in his work on Habeas Corpus (section 177) says: "It has been heretofore observed that proceedings by *habeas corpus* are summary in their character, and that great discretion is given to and exercised by courts and judges in such proceedings. Where the statute provides that courts and judges may ventilate the whole matter brought

before them by *habeas corpus*, the general principles of evidence are doubtless their rule and guide; but, they are not bound to so strict an adherence to them as govern them in trials by jury, because, in the words of that great judge, Tilghman, 'it is presumed that their knowledge of the law prevents their being carried away by the weight of testimony not strictly legal.'''

Upon the objection that it was incompetent and immaterial, the lower court at first excluded the decree and judgment roll of the divorce granted in Arizona, and then, at a later stage of the trial, admitted them for the purpose of showing that a divorce had been granted between Joseph L. Giroux and Rebecca Giroux. The consistency of these rulings is not apparent to us, but respondent's counsel contend that this decree of divorce is void, and that the lower court found it to be so. An inspection of the judgment roll satisfies us that there is nothing on its face to indicate that the decree of divorce was void, and, the existence of the decree itself being denied,—even if it could be attacked on jurisdictional grounds by extrinsic evidence,—the exclusion was erroneous. But any error in this respect seems to have been cured by the subsequent admission of the decree and judgment roll, even though this admission was limited to merely showing that a divorce had been granted. The gist of the inquiry as to this decree is whether it is void, or only voidable. Mr. Freeman, in his work on Judgments (sections 562–564, 588–590), lays it down as a general proposition that, where an action is based on the judgment of a court of another state, the jurisdiction of that court to pronounce the judgment is always open to question, and that a defendant can controvert jurisdictional statements and recitals by any competent evidence, extrinsic or otherwise. Still, the scope of this jurisdictional inquiry is clearly limited, and Mr. Freeman, in the latter part of section 564, *supra*, clearly points this out. He says: "And ought not the defendant to be always permitted to prove that he was a nonresident, and that he did not submit himself to the jurisdiction of the state whence the record is taken? On the other

hand, if the defendant were a resident within the state when and where the record was made, the fact of his subsequent removal ought neither to impair nor to strengthen the obligation of the judgment. To whatsoever state he immigrated, the record, when produced against him, should have the effect which would be given it in like circumstances if he still resided in the state whence it was taken; and this, too, independent of the question whether it is positive, doubtful; or silent in reference to jurisdictional facts. It seems to us, then, that the only issue which ought to be tried in any state in regard to the jurisdiction of a court which has rendered a personal judgment in another state is, was the defendant, when the suit was instituted, within the state whose court assumed to exercise authority over him? or, if without the state, did he submit himself to its authority? If the issue should be answered in the negative, then the judgment ought to be disregarded, no matter how positively the record enumerates all needful jurisdictional facts. If, on the other hand, the issue be determined in the affirmative, then the record ought, upon jurisdictional as upon other questions, to have precisely 'the same faith and credit given it as it had by law or usage in the courts of the state whence it was taken.'''

The evidence in the record before us in no wise establishes the fact that this divorce was void. The Arizona clerk who issued the summons, the deputy sheriff who served it, and the relator, Joseph L. Giroux, all state most positively that there was no fraud in the service of the summons upon Mrs. Giroux. She herself, in her own testimony, virtually concedes that a summons was served on her personally while she was in Arizona. The evidence in the record, moreover, conclusively shows that at the time of this service she was a resident of Arizona. Nor does the fact that she departed from Arizona a few days prior to the rendition of the decree in any wise tend to establish the fact that she was a nonresident of that territory. Construing her testimony most favorably to herself, when she left Arizona she did so with no intent whatsoever to change her domicile and begin a permanent residence in Mon-

tana. Even then, if her husband did perpetrate a fraud in respect to the obtaining of this divorce, nevertheless the jurisdiction of the Arizona court pronouncing the decree against her had clearly attached, by reason of this personal service of its process upon her, and she was as much under the control of that court as if she had remained in Arizona until the decree had been pronounced. Without passing upon the question of whether or not the general rule as to collateral attack is more stringent in a *habeas corpus* proceeding of this character than in a suit on the judgment itself sought to be assailed, we are of the opinion that, even allowing the widest latitude to the doctrine that a judgment rendered in one state may be attacked when sued upon in another in reference to its jurisdictional statements and recitals by any competent evidence, extrinsic or otherwise, this decree of divorce was voidable only, and not void. In the case of *Edgerton v. Edgerton*, 12 Mont. 122, 29 Pac. 966, the facts alleged in respect to the fraud claimed to have been perpetrated by the husband in reference to the appearance of the wife are closely analogous to the alleged facts relied upon by Mrs. Giroux in the present suit. It is true, the decree sought to be collaterally attacked in *Edgerton v. Edgerton*, was a domestic judgment, and the present subject of attack is a judgment of another state; but the latter is voidable only, like the former, and, neither being subject to collateral attack on the ground of fraud alleged to have been perpetrated by the plaintiff in each in preventing his wife from appearing at the trial, there is no distinction in the status of the two decrees. They stand on the same plane, and the law as laid down in *Edgerton v. Edgerton* is clearly applicable to this Arizona decree. See, also, 2 Bishop on Marriage, Divorce and Separation, § 1568.

It is claimed by counsel for respondent that the court below found the agreement for separation invalid. It was admitted in evidence over the objection of the respondent. But just what view the court took of this agreement the record does not disclose. In a case decided at the present term (*Stebbens v. Morris*, 47 Pac. 642), we stated generally our

views of the law applicable to agreements for separation between a husband and wife, considered with reference to the common law. To the agreement before us is added a feature which did not appear in the agreement for separation under consideration in *Stebbins v. Morris*, namely, a provision for the custody of the issue of the marriage. This new feature does not materially affect the principles laid down in *Stebbins v. Morris*, however. The matter of the custodianship of children is as proper a subject for provision in an agreement for separation between the parents as the wife's maintenance, or the division of property. If the agreement for the separation itself is not *per se* void, neither are its naturally incidental provisions. We can readily understand that, in a direct proceeding to set aside the decree of divorce itself, such an agreement might be considered void, from an evidentiary standpoint, on the ground that it was collusively entered into for the purpose of facilitating the divorce, or that, in a direct action exclusively for its enforcement, a court of equity, fully apprised of latent fraud connected with it, might declare it contrary to public policy. But in the case before us the validity of this particular agreement should stand or fall with this decree it preceded, and from which it would be difficult to separate it.

The record shows that the relator, Giroux, has paid over to Rebecca Giroux the \$4,300 he agreed to pay her, and that, even in the decree of divorce he obtained, a provision for the custody of his son alone was inserted, in strict compliance with the terms of the agreement. It inferentially appears, also, that Mrs. Giroux now relies upon this money for the maintenance of herself and the children. Should she be allowed, then, to assert a condition of financial responsibility so acquired, to establish her right to the boy, George, and at the same time object to any consideration of this very agreement which she repudiates, in so far as her own covenants therein are concerned? We think not. As shedding light upon the right to the custody of this child, the lower court properly admitted the agreement in evidence; and, if it was subsequently ignored, error was committed.

Excluding from consideration any evidence as to the alleged fraud in obtaining the divorce from his wife, the charge against Joseph L. Giroux, that he is not a fit person for the custody of the boy, is wholly unsubstantiated. It appears from Rebecca Giroux's own testimony that he is a man of means, and has always been a kind father. The charge, too, that his second wife is not a proper person to aid him in the rearing of the boy, is also without apparent foundation. Even the somewhat strained objection that she cannot speak the English language disappears in the light of the evidence. In this view, all the evidence concerning respondent's good character since she has lived in Montana is immaterial. She is before us in this record in the attitude of a justly discarded wife,—of one divorced for violation of her marital obligations. Conceding that a father recreant to his paternal duties will not be upheld in any merely arbitrary assertion of his right to the custody of his child, as against a good and conscientious mother; conceding that a child is not a mere chattel, subject to the whim or caprice of either of its parents, and that even at common law, as construed at the present time, it has an identity of its own, which courts of justice recognize and protect whenever a necessity for such protection arises,—conceding all this, and how does it avail the respondent? It must be borne in mind that the tie between parent and child is one of the most binding in human life,—one which the law of nature itself has established. No legislation, no judicial interpretation of legislation, should lightly disregard the reciprocal duties of this relationship. Conflicts between parents themselves as to the custody of their offspring are always necessarily painful. But, in the adjustment of these conflicts, mere sentiment and involuntary sympathy have no place. The law, however stern it may seem to the losing party, must govern. In these cases the elementary principles of the sturdy old common law still apply, however modified they may be by legislation and judicial interpretation, and probably will until a higher development of our present civilization supersedes them. A father is the head of the family. Upon him pri-

marily devolves the responsibility for the support—physical, moral, and social—of his wife and children. If he is true to this duty and qualified to discharge it, he is entitled to the reciprocal allegiance of those whom he so sustains, and whom it is his duty to so sustain. Where a father and mother are equally fitted in character and ability for the custody of their children, and an unhappy conflict arises between them as to who shall have such custody, in the eye of the law the father's right is superior to the mother's, and the courts must maintain it. The bond between a mother and her babies may seem closer, from a mere instinctively emotional standpoint; but under the natural compact of our society and civilization, as at present developed, and from which this legal principle has been evolved, the relation of the father to his children is the higher, sociologically considered.

The greater part of the material evidence and testimony in this record is contained in depositions and written instruments. Consequently, in considering its weight and effect we are not seriously hampered by that element of verity imported to the verdict of a jury, and the findings of a court corresponding thereto, when the witnesses have testified *viva voce* at the trial. The oral testimony of the respondent herself was manifestly elusive, vague, and contradictory. There was hardly any corroboration of it. Opposed to her statement were clear and straightforward denials in the depositions of several witnesses whose credibility was in no wise impugned, and who presumptively told the truth. The letter which Mrs. Giroux wrote to Mrs. Murry (see statement) in reference to the separation almost of itself contradicts her allegations as to fraud and deceit practiced upon her. The deposition of the notary public who took her acknowledgement to the agreement of separation states that, without the hearing of her husband, he made her acquainted with its contents, and in this agreement is a clear and unequivocal reference to the pending divorce suit. In this view of the law and the evidence, we do not think the lower court was justified in rendering the judgment it did. We do not wish to be understood as holding that this

decree of divorce awarding the custody of the child to the father was of itself absolutely binding upon the lower court. Had proof been introduced showing that the father, since the decree, had become an unfit person for the custody of the boy, and that, as between the two parents, for the child's protection it would have been better to award the custody to the mother, the conditions would have been different. But no such condition of affairs was before the lower court. Had proper weight been attached to the decree of divorce, no doubt a different judgment would have been entered. The evidence shows conclusively that there is nothing in the contention of respondent's counsel that the wife and child were domiciled in Montana at the time the decree of divorce was obtained. We have clearly expressed our view as to the wife's domicile. The child's domicile was that of his father. If the pleadings had conceded the contrary, an amendment should have been allowed as of course to conform them to the proof.

Two other alleged errors are presented for our consideration. The following interrogatory was propounded to several witnesses whose depositions were taken, namely: "Which do you consider the better qualified to have the care and custody of their said minor child, George L. Giroux, now about seven years of age,—relator or respondent?" It was objected to as incompetent on the ground that it asked for a conclusion of the witnesses. We think the court was right in sustaining the objection. The question manifestly asked for a conclusion, and was therefore clearly incompetent. The following interrogatory was also propounded: "State whether you consider respondent a fit and proper person to have the care and custody of the said minor child, George L. Giroux, and give reason for your opinion." While this last interrogatory is less objectionable than the former, still the objection to it, that it asked for a conclusion, was properly sustained. The judgment is reversed, with costs. The cause is remanded, with directions to the lower court to render judgment in favor of the appellant for the custody of the child George L. Giroux.

PEMBERTON, C. J., and HUNT, J., concur.

Reversed.

SWEENEY, RESPONDENT, v. MONTANA CENTRAL RAIL-
WAY CO., APPELLANT.

[Submitted January 22, 1897. Decided February 1, 1897.]

Trespass—Release—Pleading—Damages.

19	163
25	548
25	550
19	163
31	518

TRESPASS—Release—Pleading.—Plaintiff sued in trespass for damages to real property; the defendant pleaded an agreement of plaintiff to convey to defendant a portion of the property, and a release and discharge as follows: that the plaintiff agreed to “release all damages heretofore caused — (on the premises) by any act — of defendant — as well as all damages that might thereafter be occasioned to any part of the property on account of defendant’s use of the part conveyed.” Among others the following denials were contained in the replication, “plaintiff denies that under and by virtue of said contract — or any other contract, he agreed to and did release defendant from damages caused by the acts complained of” and “plaintiff admits that the defendant paid — for the land conveyed and the ordinary incidental damages to the adjacent land, but not the damages for the trespass complained of in the complaint.” *Held*, that an issue as to settlement and discharge was raised.

SAME—Evidence.—The trespass complained of was the digging of a new channel, which changed the natural course of a stream which ran through plaintiff’s land. The trespass was not continuous in its nature, this was admitted by plaintiff. Evidence was admitted tending to prove the difference in the market value of the land before and after the trespass. Subsequently plaintiff introduced evidence of the result of the stream overflowing the new channel subsequent to the original trespass. *Held*, that this evidence was properly admitted for the purpose of showing the difference in the market value of the premises before and after the trespass.

SAME—Damages—Instructions.—The court charged the jury in instruction No. 5 that the measure of damage was the difference in the market value before and after the trespass; and in instruction No. 9 the court charged the jury that in estimating the damages they might consider the evidence of the overflowing of the stream above referred to, and refused defendant’s request to charge that plaintiff could not recover damages for such overflowing. *Held*, that it was error not to limit the effect of the evidence above referred to as requested by defendant, and that instruction No. 9 was misleading in the absence of such limitation.

SAME—Evidence of Plaintiff’s Neglect.—Defendant offered to prove that plaintiff by an expenditure of \$100 could have entirely avoided or materially decreased the damages caused by defendant’s act; and also requested certain instructions on this theory of the law. *Held*, it was error to refuse the evidence and instructions; *Held*, also, that such refusal is not justified by an argument of counsel for respondent, to the effect that plaintiff could not have avoided the damages—it was for the jury to say from the evidence whether or not this could have been done.

Appeal from District Court, Cascade County; C. H. Benton, Judge.

ACTION by Patrick Sweeney against the Montana Central Railway Company. There was judgment for plaintiff, and defendant appeals. *Reversed.*

Statement of the case by the justice delivering the opinion.

This is an action to recover damages to real estate. The plaintiff in his complaint alleges that in the year 1891 he was the owner of a certain mining claim called the "Nellie L. Quartz Lode," at Neihart, Meagher county, through which claim Belt creek ran at that time; that on or about the 1st day of November of that year, it is alleged, the defendant wrongfully entered upon said mining claim, and excavated a new channel across the same, into which it diverted the entire waters and current of Belt creek; that such water has since flowed entirely in the new channel; that said new channel was excavated across a valuable part of said mining claim, which part of said claim, it is alleged, was particularly valuable for town lots or building purposes, and also for dumping ground in the working of said mining claim. It is further alleged in the complaint that said Belt creek, being thus caused to run in said new channel excavated by the defendant across said mining claim, overflowed the banks of said channel on the side next to the bluff,—on the southeastern side of said claim,—and destroyed and washed away a large area of land of the plaintiff to wit, 1.87 acres of said mining claim, and that said part of said mining claim was rendered wholly valueless to the plaintiff by such overflowing and washing away of the soil thereof. The plaintiff asked judgment for damages against the defendant. The answer of the defendant admits that the plaintiff was the owner of the tract of land in question, and that defendant entered upon the same, and dug a new channel, into which it diverted the waters of Belt creek, but alleges that said action on its part was with the consent of plaintiff, and denies that any damage resulted therefrom. In addition to this, defendant pleads the statute of limitations as a bar to the action, and further pleads a settlement and discharge of any liability for any damages growing out of the alleged trespass. The replication denies the new matter set up in the answer. The case was tried by the court with a jury, and a verdict rendered for \$1,850, upon which judgment was entered. A bill of exceptions was filed and settled, and appeal taken from the judgment by defendant company.

A. J. Shores, for Appellant.

McConnell, Clayberg & Gunn, for Respondent.

PEMBERTON, C. J.—There are a great many errors assigned in the record. We will treat those only which counsel for appellant considered sufficiently important and material as to deserve special mention and notice in his oral argument of the case. Counsel for appellant contends that there was no denial in the replication of the settlement and release pleaded in the answer, and that there was, consequently, no issue to submit to the jury, and that the court erred in admitting any evidence in the case, and in submitting the question of damages to the jury. This contention is raised in the record by objection to the introduction of evidence, as well as by the motion of appellant for a nonsuit at the close of plaintiff's testimony. The allegation of settlement and release contained in appellant's answer is as follows: "That in the month of March, 1892, the said Daniel Condon and this defendant entered into an agreement whereby the said Condon, in consideration of \$1,500, to be paid, agreed to convey to this defendant a certain tract of land, particularly described in a deed hereinafter referred to, and release all damages theretofore caused on the Nellie L. lode claim, or any part thereof, by any acts theretofore committed by the defendant, or any of its agents or employes, as well as all damages that might thereafter be occasioned to any part of the said tract of land on account of the use of the tract so to be conveyed to this defendant on its line of railway for railway purposes." The language of the reply to this allegation is as follows: "Admits that a deed was executed by Daniel Condon, who then held the legal title to the Nellie L. lode claim, on the 24th day of March, 1892, to the strip of ground therein described, to the defendant, and he supposes that the copy of the deed set out in the defendant's answer is correct; but denies that there was any other, further, or different agreement or contract in relation to the said tract of land, except what is set out in said deed." This is not a specific denial of the allegation of the answer as to the settle-

ment and release, and, if there were no other denials in the replication to this allegation of the answer, the contention of the appellant would have greater force. But in the replication we find, immediately following the language quoted above, this denial: "Plaintiff denies that under and by virtue of said contract contained in said deed, or any other contract, that he agreed to and did release the defendant from damages caused by the acts complained of in his complaint." Paragraph 5 of the replication is as follows: "Plaintiff admits that the defendant paid to said Condon the sum of \$1,500 for the land conveyed and the ordinary incidental damages to the adjacent lands, but not the damages for the taking of other portions of plaintiff's land for a new channel into and through which to flow the waters of Belt creek." We think, construing the several paragraphs and denials of the replication together, that they fairly and sufficiently constitute a denial of the settlement and release pleaded in the answer, and that, consequently, appellant's assignment of error in this respect is not supported.

The court permitted evidence to be introduced as to the difference in the market value of the land alleged to be damaged before and after the trespass complained of. Evidence was also permitted to be introduced, on the part of plaintiff, as to the result of overflows and washing away of the soil after the channel was cut through the land, or the trespass committed, in November, 1891, down to October, 1893. With this evidence admitted over the objection of the appellant, the court instructed the jury as follows: "The measure of damages is the difference in the market value of said premises, the Nellie L. lode, as they were before they were injured, if injured at all, and the market value of said premises in their damaged condition, if damaged at all." Instruction No. 5. The court further instructed the jury as follows: "The court further instructs you that, in estimating the market value of the premises alleged to have been injured or damaged, you will take into consideration, not only the trespass committed by the cutting of the channel and the turning in of the water, but

also the overflow of the water, and the washing away of the south bank of the channel, and of the soil and ground, if you find that to be true, situated between said channel and the bluff, as described in the complaint. You will not be confined to the mere damage done by the cutting of the channel, and the turning in of the water, but you will also embrace in your consideration the consequential injuries or damage by the overflow of the waters, if any such occurred." Instruction No. 9. For the purpose of fixing the measure of damages, and confining the inquiry of the jury to the difference between the market value of the land before and after the trespass complained of, the appellant requested the court to instruct the jury as follows: "There has been some evidence in the case tending to show damages done to the strip of ground between the new channel and the bluff between the years 1892 and 1893. I instruct you that the plaintiff is not entitled to recover on account of any damages done to that strip of land either in the year 1892 or 1893." This instruction the court refused to give. The appellant contends that the action of the court in this respect was error. It is conceded that the trespass complained of was a completed trespass, and not a continuous one; that is, that the sole liability of the defendant company was determined and fixed by the trespass which wrought the difference in the market value of the land before and after its commission, in November, 1891. Instruction No. 5, quoted above, was given upon this theory. The appellant contends that, by giving instruction No. 9 at the instance of plaintiff and refusing the instruction asked by appellant as shown above, the court permitted the jury to render a verdict, not only for the difference in the market value of the land before and after the trespass complained of, but also for injuries to the land caused by overflows up to October, 1893. While we think it was not error to permit evidence to be introduced as to the overflows and washing away of the land after the date of the trespass complained of, for the purpose of showing the difference in the market value of the land before and after the trespass, it was error in the court not to

limit the evidence to that purpose, as requested by the instruction which the court refused. Instruction No. 9, we think, was misleading to the jury, and prejudicial to the appellant, without the limitation sought to be given to the evidence by appellant's instruction, which was refused by the court.

At the trial the appellant offered evidence to show that the plaintiff, by the expenditure of \$100 in riprapping the bank of the new channel next to the bluff on the land in question, could have avoided entirely, or materially diminished, the damages to the mining claim. Appellant also offered instructions upon this theory of the law. The court excluded this evidence, and refused to give the instructions requested by appellant. Appellant assigns this action of the court as error. Counsel for the plaintiff in his brief says: "We recognize the principle of law that, where a trespass has been committed, it is the duty of the party complaining of the trespass to do what he reasonably can to prevent an increase of injury, and that this must, under ordinary circumstances, be taken into consideration in estimating the damages." But counsel for respondent says that the respondent could not, by riprapping the bank of the new channel next to the bluff on his own claim, prevent the overflow thereof and damages thereto, for the reason, as they contend, that the channel began to overflow the bottom land before it reached the line of respondent's claim, and that he could not riprap the channel on the land adjoining his, through which the channel ran, without being a trespasser. If the evidence offered by the appellant had been admitted, it might have been proper for respondent to support this theory by proper evidence in rebuttal. But we think it hardly sound to say the appellant ought not to be heard to complain because he could not have proved his contention if the court had not excluded his evidence. We think the court erred in excluding the evidence offered by the appellant, and in refusing the instructions, as contended by appellant under this assignment. The following authorities fully discuss, and, we think, determine, this question in accordance with the views expressed above. (1 Sedg. Meas. Dam. (7th

Ed.) top page 164, and authorities cited in notes; 1 Suth. on Damages, pages 414-416, and authorities cited; *Loker v. Damon*, 17 Pick. 284.)

Appellant contends that the court erred in not permitting it to amend its answer during the trial to conform to the proof, which, it contends, showed Condon to be a real party plaintiff in interest. As the case must go back for new trial, the amendment can there be made, if appellant so desires, and we are thus relieved of the necessity of treating this assignment. The plea of the statute of limitations set up in the answer was abandoned on the trial. We have considered and treated all the errors assigned which we consider material. The judgment appealed from is reversed, and the cause remanded for new trial.

Reversed.

HUNT and BUCK, JJ., concur.

HOLTER ET AL., RESPONDENTS, *v.* WASSWEILER AND WIFE, APPELLANTS.

[Submitted January 29, 1897. Decided February 6, 1897.]

Fraudulent Conveyance—Husband and Wife—Laches.

FRAUDULENT CONVEYANCES—Husband and Wife.—Under the presumption law defendant Ferdinand Wassweiler obtained patent to 160 acres of land, one-half of which he sold in 1873 for \$10,000, of which one-half was paid to him at once, and the other half was subsequently paid to the wife, who, 25 September, 1883, turned it over to her husband; from defendants' testimony it further appears that they had an agreement between themselves that she was to have one-half of the purchase price of the land whenever the same was sold, and one-half of the profits of the business which they conducted on the premises. It further appears from defendants' testimony that, when Mrs. Wassweiler paid to her husband the money above mentioned, it was agreed between them that he should use the money in improvements upon the half of the premises not sold, and that he should, upon demand, convey to her that half of the real estate for her own separate use, which he did in June, 1892, by a deed to one "T" who thereupon conveyed the premises to the wife. In 1887 the defendant Ferdinand Wassweiler gave to plaintiff his promissory note in payment of material, a part or all of which he had used in improvements on the premises subsequently conveyed to the wife, the title of the premises being in the husband of record and remaining in his name until June, 1892. *Held*, that by reason of the negligence and laches of the wife in allowing the title to stand in her husband's name and in allow-

ing him so to use the same and hold the title thereto as to induce others to believe that he owned the property, she could not in equity claim the premises freed from the lien of plaintiff's judgment.

Appeal from District Court, Lewis and Clarke County. H. R. Buck, Judge.

ACTION by A. M. Holter and M. M. Holter, co-partners as A. M. Holter and Bro., against Ferdinand J. Wassweiler and wife to cancel certain conveyances From a judgment for plaintiffs, defendants appeal. Affirmed.

Statement of the case by the justice delivering the opinion.

The plaintiffs are co-partners, and the defendants husband and wife. From the pleadings and record it appears that on the 26th day of September, 1887, the defendant Ferdinand J. Wassweiler executed to the plaintiffs his promissory note for the sum of \$838.20, with interest thereon at the rate of 1 per cent. per month from date until paid; that said note was only paid in part; that on the 11th day of January, 1893, plaintiffs commenced a suit in the district court in and for the county of Lewis and Clarke, against said defendant Ferdinand J. Wassweiler, to recover the balance due and unpaid on said note, and on the 18th day of February, 1893, recovered judgment in said action against said defendant for the sum of \$927.75 and costs; that an execution was thereafter issued out of said court on said judgment, and directed to the sheriff of said Lewis and Clarke county; and that thereafter said execution was returned by the sheriff wholly unsatisfied, on account of the sheriff's inability to find property belonging to said defendant in said county to satisfy the same. It appears that, at the time of the execution of said note by said Ferdinand J. Wassweiler, he was the owner of certain real estate situated in Lewis and Clarke county, and fully described in the complaint; and it is alleged that on or about the 1st day of June, 1892, Ferdinand J. Wassweiler and his wife, Caroline C. Wassweiler, for the purpose and with intent of cheating and defrauding the plaintiffs out of the money due upon the claim

and judgment aforesaid, executed a certain conveyance, by which they pretended to convey to one H. S. Tullis the lands described in the complaint, for the alleged consideration of \$4,000; and that thereafter said Tullis made and executed a certain instrument or conveyance to the defendant Caroline C. Wassweiler, for the same premises, for the alleged consideration of \$4,000. It is further alleged that there was no consideration for either of said conveyances, and that the same were executed for the purpose of conveying the title to the defendant Caroline C. Wassweiler, with intent and for the purpose of hindering, delaying, cheating, and defrauding the creditors of said Ferdinand J. Wassweiler, and especially these plaintiffs. It is alleged that, notwithstanding said pretended conveyances, the said Ferdinand J. Wassweiler has always been the owner, and is now the owner of said real estate. It is also alleged that said Ferdinand J. Wassweiler has no other property that can be reached by execution to satisfy said judgment. Plaintiffs therefore ask judgment that the said pretended conveyances from defendants to said Tullis, and from said Tullis to the defendant Caroline C. Wassweiler, be declared fraudulent and void, and that the same be canceled, and that the premises described in the complaint be sold, and the proceeds thereof applied to the payment of plaintiffs' judgment, and that it be decreed that the said Caroline C. Wassweiler acquired no title by virtue of said pretended conveyance to her from Tullis. The separate answers of defendants admit the execution of the note by said Ferdinand J. Wassweiler, the recovery of the judgment against him, as alleged in the complaint, and the issuance and return of the execution thereon. The answers deny that Ferdinand J. Wassweiler was the owner of the real estate described in the complaint at the times mentioned therein. The fraudulent intent with which it is charged said deeds mentioned in the complaint were executed is also denied. It is admitted that there was no consideration passed to Tullis for the conveyance of the real estate by him to Caroline C. Wassweiler. The answers set up affirmatively that the defendants have lived upon the land de-

scribed in the complaint, since 1883, as a homestead. It appears from the record that the 80 acres of land described in the complaint are one-half of a tract of land acquired by the defendant Ferdinand J. Wassweiler under the pre-emption laws of the United States, on which defendants located and lived since 1865. The other half of the tract of land was conveyed by the defendants to C. A. Broadwater about 1873 or 1874, for \$10,000. It further appears he paid one-half cash, and the remaining half some years later. The alleged cash payment was made to the husband, Ferdinand J. Wassweiler, and he used the same. The remaining half of the purchase price of said tract of land was paid by Broadwater to Caroline C. Wassweiler, and was deposited to her credit in the First National Bank of Helena. It was to her credit there from November 3, 1882, to September, 1883, when she turned it over to her husband. The testimony shows that the defendant Caroline C. Wassweiler turned this money over to her husband, with the understanding that he was to use the same for the purpose of constructing buildings and improvements on the 80 acres of land described in the complaint. From the testimony of the defendants it appears that there was an agreement between them by which Caroline C. Wassweiler was to have one-half of the proceeds of the whole tract of land obtained by Wassweiler from the government whenever the same should be sold, and also one-half of the profits of the business which they were conducting on said premises. It appears from their testimony that, when they sold one-half of the tract of land to Broadwater, the defendant Ferdinand J. Wassweiler took and used the cash payment of one-half of the purchase price, and that the deferred payment of the purchase price was paid to the defendant Caroline C. Wassweiler; and it also appears that, when Caroline C. Wassweiler paid over the money which was paid to her as her one-half of the purchase price of the land sold to Broadwater, it was with the aforesaid understanding that her husband, Ferdinand J. Wassweiler, should use the same for improving the 80 acres mentioned in the complaint, and that he should, when demanded, deed the

same to Caroline C. Wassweiler, to be held and owned by her as her own separate property. It seems from the evidence of the defendants that Ferdinand J. Wassweiler's agreement to deed said premises mentioned in the complaint was not complied with until the date of the deeds, as shown above. The case was tried to the court, without a jury. The court found the issues in favor of plaintiffs, and rendered judgment against the defendants in accordance with the prayer of the complaint. From the judgment and order overruling defendants' motion for a new trial, this appeal is prosecuted.

T. J. Walsh, for Appellants.

Walsh & Newman, for Respondents.

PEMBERTON, C. J.—In his brief, counsel for appellants says: "It appears to have been contended at the trial that the money which Mrs. Wassweiler let Mr. Wassweiler have was his anyway. and that the alleged agreements were void by reason of the relationship between them, the transaction having occurred prior to the passage of the married woman's emancipation act. In this view the court concurred, and placed its ruling substantially on this ground. The case stands for determination on the correctness of this contention, and it is respectfully submitted that, as a legal proposition, it cannot be sustained. It is unnecessary to rely on the agreement testified to by both of the defendants, that from the first it was agreed between them that the real estate they were acquiring should be held and enjoyed jointly. When it came to a sale of the tract to Broadwater, she had valuable rights in it, which she was not obliged to surrender except on her own terms. * * * She had a dower interest in it, at all events, and a homestead right. A conveyance by her husband without her concurrence would have been absolutely void. She had a perfect right to refuse to join in the conveyance unless her half were paid or secured to her. It was paid to her, and took the form of certificates of deposit,—choses in action. These were hers, absolutely. Unless they were reduced to his possession

during his lifetime, they passed to her heirs, not to his. And he was powerless to obtain them except upon making her an adequate settlement out of his estate. Although the common law considered him the owner of the securities, this was a dogma so repugnant to the court of chancery that it devised a scheme of trusteeship for the wife in a third person for the manifest purpose of avoiding its effect. As the husband could not sue the wife at common law, he was powerless to get her choses unless he resorted to the court of chancery, before which the law was considered unconscionable; and that tribunal would refuse to compel the wife to surrender unless the husband created a trusteeship in her behalf, and thus made her an adequate settlement out of his own estate."

In support of the above argument, counsel cites 1 Daniell on Ch. Prac., p. 90 *et seq.*, and authorities cited in notes. Counsel also contends that, even if it be admitted that the agreements relied on between the defendants were made when the common-law rule in relation to the rights of married women was in force in this state, still, he says "the husband could not have possessed himself of these assets except he did substantially what he did afterwards, and that of which the plaintiff complains. In view of the expressions found in the foregoing authorities and the general rules governing the action of the court of chancery, there is no doubt that, if the husband obtained the wife's choses upon an agreement to convey to her a portion of his real estate, equity would either compel him to do so, or to restore the property he got, or make some other adequate provision for her. Indeed, however he obtained them, she could maintain a bill against him to compel a settlement, even after his assignment for the benefit of creditors, or the institution of bankruptcy proceedings, or in a suit by his assignee not *bona fide* or for a valuable consideration,"—and cites the following authorities in support of his contention: Pomeroy's Equity Jur., § 1114; *Beal's Ex'r v. Storm*, 26 N. J. Eq. 372; *Sykes v. Chadwick*, 18 Wall. 141. In support of the contention of counsel for appellants that the release of her dower rights in the real estate mentioned in the complaint

was a sufficient consideration to support the claim of the wife to an enforcement of the agreements between the defendants in a court of equity, he cites 1 Am. Lead. Cas. 65, 66; *Hershy v. Latham*, 46 Ark. 542, and authorities cited; *Garner v. Bank*, 151 U. S. 420, 14 Sup. Ct. 390; *Lambrecht v. Pat-ten*, 15 Mont. 260, 38 Pac. 1063. In view of the foregoing authorities, counsel for appellants contends that the agreement between the husband and wife shown in the evidence is valid, and supported by a sufficient consideration, and is enforceable in equity against the husband, as well as against his creditors or assignees. Counsel for appellants also says: "It is undoubtedly true that if the wife had done anything to induce the belief that the premises in question were the absolute property of the husband, and that she had no claims against it, and the debt had been contracted upon the faith of his ownership of it, or upon a credit induced by his apparent ownership, some question might possibly arise; but it is sufficient to say that no such case is made, either by the pleadings or the proof, and the law is now well settled that a wife may be preferred upon a *bona fide* obligation as well as any other creditor, and is under no more obligation to publish her claims than any other creditor." Appellants' counsel also says that the equitable doctrine contended for here was entirely overlooked by the court below.

Now, then, let us admit that the agreement relied upon by the appellants is valid as between themselves, and one which a court of equity would enforce as between themselves, and, under ordinary circumstances, against the creditors and assignees of the husband; still, are the facts and circumstances of this case such as would authorize the enforcement of the agreement by a court of equity in favor of the wife, as against the rights of the plaintiffs? In the language of counsel for the appellants, does the evidence show that the wife has "done anything to induce the belief that the premises in question were the absolute property of the husband, and that she had no claims against it," or that "the debt had been contracted upon the faith of his ownership of it, or upon a credit

induced by his apparent ownership?" The evidence shows that the title to the whole tract of land acquired by the husband from the government remained of record in his name until the sale of one-half thereof to Broadwater, in 1873 or, 1874, and that thereafter the title to the 80 acres in controversy remained in the name of the husband until 1892, when it was conveyed to Tullis, and by Tullis to the wife. This was nine years after the wife turned over the \$5,000 paid to her by Broadwater, as her part of the purchase price of the land sold to him by appellants, to her husband, for the purpose of improving the land in controversy. This was nine years after the agreement was made by the husband to deed the land in controversy to the wife. For nine years the wife permitted the land in controversy to stand on the records in the name of the husband after he had agreed to convey it to her. Who can say that the wife did not thereby "induce the belief" in the minds of the plaintiffs, as well as of the public, "that the premises in question were the absolute property of the husband, and that she had no claims against it," and that in this case the debt had not "been contracted upon the faith of his ownership, or upon credit induced by his apparent ownership?" The wife in this case also authorized her husband to use the money she let him have to improve the premises in controversy. As shown by the wife's own testimony, her husband was authorized to improve the premises in controversy. She let him have her money for that purpose. If he went in debt in making these improvements, and did not limit himself to such improvements as he could or did pay for with her money, he was still her representative. She had placed him in a position or, at least, permitted him to occupy a position, where he could impose on those with whom he was dealing in improving the premises. We think, from the evidence, that a very considerable part of the husband's indebtedness, if not all, to the plaintiffs, was incurred for hardware and lumber which went into the buildings and improvements placed on the premises by the husband. If this be not so, it was incumbent on the appellants to show it before the wife.

could equitably ask to be permitted to hold the premises free from the incumbrance of plaintiffs' judgment for a debt incurred under the circumstances of this case. If the wife in this case would claim the land in controversy as her own under the agreement in relation thereto made with her husband, she should, at least, take it subject to the incumbrances which have been placed upon it through her own negligence and laches,—negligence and laches which were calculated to mislead those dealing with her representative. If she would have equity, she must do equity.

We are unable to determine how much the value of these premises has been enhanced by the building materials for which the husband's indebtedness was incurred to plaintiffs. But, however much the value thereof has been thus increased, we do not think it equitable that the wife should, under the circumstances, take the land in controversy freed from the judgment lien of the plaintiffs, and that, until she has discharged this lien, she has no standing in a court of equity. Respondents' objections to this court hearing this appeal, involving questions of practice, become immaterial under the foregoing treatment of the case. The judgment and order appealed from are affirmed.

Affirmed.

HUNT, J., concurs. BUCK, J., disqualified.

LAUBENHEIMER, APPELLANT, v. BACH, CORY & CO.
ET AL., RESPONDENTS.

19	177
19	234
19	177
21	95

[Submitted January 26, 1897. Decided February 8, 1897.]

Conversion—Title—Presumption—Evidence.

CONVERSION.—In an action for conversion, the answer admitted that plaintiff had been the owner, and then alleged title in defendants by conveyance from vendee of plaintiff; at the trial, defendants offered evidence tending to show plaintiff's declaration that he had sold the property. *Held*, that, it appearing that plaintiff had been the

owner of the property, the presumption was that he continued to remain so; that as the declarations admitted in evidence tended to show a sale by plaintiff, it was error to refuse in rebuttal evidence tending to show statements made by defendant's vendor to their agent prior to and at the time of the alleged sale to them, that he was not the owner of the property.

Appeal from District Court Cascade County. C. H. Benton, Judge.

ACTION by Valentine Laubenhaimer against Bach, Cory & Co., Limited, and others, for conversion. Judgment for defendants, and plaintiff appeals. Reversed.

Statement of the case by the justice delivering the opinion.

Suit to recover \$9,750, with interest, the value of 325 head of cattle belonging to plaintiff, and alleged to have been converted by the defendants. The answer denied the allegations of the complaint, and alleged that on or about February 22, 1892, the defendant Bach, Cory & Co., Limited, purchased of one J. H. Brand 250 head of stock cattle, branded with the Four Bar brand, and thereafter, while being such owner under such purchase, sold the cattle to the other defendants, and alleged that said cattle are the same referred to in plaintiff's complaint; that prior to the purchase by Bach, Cory & Co. of the cattle from Brand, the plaintiff, Laubenhaimer, was the owner of said cattle, and while being such owner sold the same to the said Brand and one Nelson, who were then co-partners; and afterwards the said Brand became the owner of said 250 head of cattle, and was the owner thereof continuously until his sale to Bach, Cory & Co. The defendants also alleged that at the time that Bach, Cory & Co. were negotiating with Brand for the purchase of the cattle sued for in the plaintiff's complaint, plaintiff, Laubenhaimer, was present at all times, and was fully cognizant of all that was being done relative to the sale and delivery of said cattle, and was aiding and assisting Bach, Cory & Co. in consummating the purchase of said cattle. The replication denied the purchase by Bach, Cory & Co. from Brand, or that Brand ever owned the cattle described in the complaint, or that he (plaintiff) ever was cognizant of

the alleged purchase and negotiation of Bach, Cory & Co. and Brand, or that he ever aided Bach, Cory & Co. in consummating the alleged purchase. On the trial of the case before a jury, plaintiff's testimony was that in January, 1890, he purchased the cattle described in the complaint, which then numbered 250 head, from H. W. Child; that at the time of the purchase the cattle were at Ming Coulee, Cascade county; that he had never parted with the title to the cattle, and was the owner of them in March, 1892, and when this suit was instituted; that he never authorized the defendants or their agents to take possession of the cattle; that at the time that Brand made an assignment to Bach, Cory & Co., to wit, February, 1892, by which Brand transferred the cattle to Bach, Cory & Co. plaintiff notified the defendants that they were his cattle, and that he wanted them; that he never knew that Bach, Cory & Co. would attempt to take the cattle from him; and that he told them that if they did attempt so to do they would take them at their peril. On cross-examination the plaintiff testified that in 1890 the cattle had been transferred from Ming Coulee, where they were when he purchased them, to the ranch known as the "Brand & Nelson Ranch;" that the reason for the transfer was that plaintiff permitted Brand to take the cattle into his charge, with the further right that if at any time he could pay the purchase price plaintiff would transfer the Four Bar brand to him. In accordance with this arrangement, the cattle were removed to the Brand & Nelson ranch. The price which Brand was to pay for the cattle was \$7,500, with interest; but it is alleged that no part of it had ever been paid. The evidence of the defendants was, in effect, that Brand & Nelson, in 1891, bought the cattle with the Four Bar brand from H. W. Child, and that the cattle were delivered to them by Child from Ming Coulee at their ranch, and that Brand & Nelson were to pay for the cattle when they could; that plaintiff never attempted to exercise any control over the cattle, and that the sale was an unconditional one by Child to Brand & Nelson; that long subsequent to the purchase of the cattle by Brand & Nelson, Laubenheimer stated that he had

retained the title to the cattle in question, but that he was told by Nelson that this was not so; that Laubenheimer admitted that the sale had been unconditional, but that, six months after the sale and delivery of the cattle to Brand & Nelson, he then made an arrangement by which he was to retain the title by a kind of a verbal chattel mortgage. The defendants introduced several witnesses, among others D. A. Cory, an officer of Bach, Cory & Co., who testified that at several meetings held in the office of Bach, Cory & Co., at Great Falls, Mont., Laubenheimer was present, but that he never made a claim to the cattle in question until November, 1892; that at that time Laubenheimer did assert some right to the cattle but stated that he had sold and delivered the cattle to Brand & Nelson, and retained the title by some kind of a verbal chattel mortgage, obtained six months after the sale to Brand & Nelson. It was admitted that in March, 1892, and at the time of the alleged sale by Brand to Bach, Cory & Co., a witness by the name of Willard represented the defendant Bach, Cory & Co. in the matter of the cattle negotiations had between that corporation and Brand. There was testimony also introduced by the defendants tending to show that when Bach, Cory & Co. took possession of the cattle, Laubenheimer was at the ranch of Brand & Nelson, and knew of the directions to the man in charge of the cattle to hold them for the defendants. On rebuttal the plaintiff testified that he had never admitted that Brand & Nelson had purchased the cattle. Willard, the witness referred to as the manager for Bach Cory & Co., was asked on rebuttal whether he had had any conversations with Brand relative to the ownership of the cattle at the time of the purchase of the cattle made by Bach, Cory & Co. from Brand & Nelson. The defendants objected to the question on the ground that it was not proper evidence in rebuttal. The court sustained the objection, and plaintiff duly excepted. Thereupon the plaintiff offered to prove that Willard acted in behalf of Bach, Cory & Co. in the purchase of the cattle, and 'at the store of Bach, Cory & Co., Mr. Brand, a short time previous to the attempted sale by him of the cattle in ques-

tion, told Mr. Willard that he (Brand) did not own these cattle; that Mr. Willard stated that he (Brand) must have some right to those cattle, because he had been keeping them; that Mr. Brand refused to make any transfer of the cattle in controversy because of the fact that he (Brand) had no right or title to the same; that at the request of Mr. Willard, Brand included the cattle in controversy in a transfer by Brand to Bach, Cory & Co.; that Willard was the general manager of Bach, Cory & Co. at that time, and at the time of the completion of the sale of the cattle in controversy by Brand to Bach, Cory & Co.; that Mr. Willard notified Mr. Cory of this conversation, and repeated the same in substance to Mr. Cory, about the time of the sale to Bach, Cory & Co." This offer was rejected by the court, because not proper evidence in rebuttal, and hearsay. Plaintiff then made a similar offer of the statements made by Brand to Willard, and the communication of such statements by Willard to E. W. Bach, another of the defendants' officers, and the manager of a pool arrangement between Bach, Cory & Co. and the other defendants in this suit. This evidence was also rejected by the court, because not rebuttal, and hearsay. Plaintiff then asked the witness Willard whether Laubenheimer, the plaintiff, at any time while Bach, Cory & Co. were seeking to acquire title to the cattle through Brand & Nelson, notified him as to whom the cattle belonged. This question was objected to on the ground that it was immaterial and improper on rebuttal, and the objection was sustained. Witness was then asked if Mr. Laubenheimer ever told him, in the presence of E. W. Bach or D. A. Cory, of his claim to the cattle. This was objected to, and the objection sustained. The court also refused to permit plaintiff to ask the witness if Laubenheimer had not in the fall of 1891 in his presence notified Bach of his claim to the cattle. The jury found a verdict for the defendants. Before they retired, the plaintiff asked the court to instruct, among other things, that where a person is proved to be the owner of personal property with the present right of possession, the presumption is that he continues to be the owner with the right

of possession until there is evidence that he has parted with that ownership or right of possession. The court refused to so charge. Judgment was entered on the verdict for the defendants, and a motion for a new trial was thereafter made and overruled. The plaintiff appeals from the order denying the motion for a new trial and from the judgment.

Thomas C. Bach and William T. Pigott, for Appellant.

W. G. Downing and Carpenter & Carpenter, for Respondents.

HUNT, J.—We think the court properly concluded to submit the case to the jury upon the ground that the testimony of Nelson and the admissions of the plaintiff testified to by the defendants' witnesses raised an issue of fact as to the ownership of the cattle in controversy, which was right for the jury to pass on. But we are unable to uphold the rulings of the district court in rejecting the offer of proof made by plaintiff in rebuttal testimony. The complaint alleged ownership, possession, and right of possession of the cattle in controversy, their value, and a wrongful taking by defendants, and defendants' refusal to give them up, although demand was made. As to these matters the answer may be treated as substantially a denial; but for an affirmative defense the answer set up a purchase on February 22, 1892, from a third party, J. H. Brand, who, with one Nelson, had originally purchased the cattle from plaintiff, and who was the sole owner when he sold to defendants, and that by reason of plaintiff's knowledge of the sale to defendants, and his silence about the time of such sale, he was estopped from claiming title. At the trial, plaintiff introduced evidence to prove his purchase and right of possession, the taking by defendants, value of the cattle, and other matters necessary to sustain *prima facie* the averments of his complaint. Defendants were then allowed to introduce evidence to prove that one H. W. Child sold the cattle to Brand & Nelson, and also that plaintiff admitted that he had sold the cattle to Brand & Nelson, and never claimed any interest

therein until a long time thereafter, in November, 1892, and then only said that he had a claim by virtue of a verbal chattel mortgage, which it may be assumed would amount to no claim as against the rights of third parties.

When defendants rested, the plaintiff offered (as recited more fully in the statement of facts) to disprove the statements made by defendants' witnesses by rebutting such proofs by counter evidence of his own, but was erroneously not permitted to do so. The evidence offered was rebuttal. When plaintiff rested, he had made out his *prima facie* case. It was not necessary for him to go further than to show generally his own ownership and right of immediate possession. The presumption was then that plaintiff continued to be the owner with right of possession until there was evidence that he parted with that ownership or right of possession. And the court ought to have so charged. (Lawson on Pres. Ev. pages 163, 164; Jones on Evidence § 53.) He was not obliged to anticipate the affirmative defenses of the answer, and to furnish evidence to negative their truth. When the defendants introduced their evidence tending to show purchase from Child and admissions by plaintiff, it was the right of plaintiff to call witnesses in relation to the statements and admissions by Brand, the alleged owner, made prior to and at the time of the sale by him to Bach, Cory & Co. concerning the title to the cattle, and of the communication of Brand's statements to members of the firm of Bach, Cory & Co., and also to explain plaintiff's alleged conduct about that time and thereafter in not claiming title to the cattle. A party has a right in rebuttal to give evidence which tends to meet the affirmative defense sought to be established by the defendants, and it is error to deny him that right. (*Driscoll v. Dunwoody*, 7 Mont. 394, 16 Pac. 726; *Bancroft v. Sheehan*, 21 Hun. 551; Thompson on Trials, § 345.) "As a general rule, he who has the opening ought to introduce all his evidence to make out his side of the issue, except that which merely serves to answer the adversary's case. Then the evidence of the adversary is heard, and, finally, the party

who had the opening may introduce rebutting evidence which merely serves to answer or qualify his adversary's case. Rebutting evidence, within this rule, means not all evidence whatever which contradicts defendant's witnesses and corroborates plaintiff's, but evidence in denial of some affirmative case or fact which defendant has attempted to prove. Neither side ought to be permitted to give evidence by piecemeal." (Abbott on Trial Brief, pages 41, 42.) The effect of the court's rulings was very prejudicial to plaintiff, because it denied him the right to contradict the defendants' testimony upon most material matters. Obviously, if the admissions or statements made by plaintiff to the witness Cory and others tended to prove that plaintiff sold the cattle in dispute to Brand & Nelson, it was unjust to exclude plaintiff's offer to prove to the contrary; and this he was only obliged to do on rebuttal. These errors are the principal ones relied on by the appellant, and cover the others assigned. The judgment and order are reversed, and the case is remanded for new trial.

Reversed.

PEMBERTON, C. J., and BUCK, J., concur.

JURGENS, SHERIFF, RESPONDENT, v. HAUSER, APPELLANT.

[Submitted February , 1897. Decided February 8, 1897.]

Foreclosure Sale—Sheriff's Commission.

Under section 4634 of the Political Code, a sheriff is entitled to his commission on the purchase price of real estate sold by him under an order of sale in a suit of foreclosure when the mortgagee buys in the premises.

Appeal from District Court, Lewis and Clarke County. H. N. Blake, Judge.

ACTION by Henry Jurgens, sheriff of Lewis and Clarke

county, Mont., against Samuel T. Hauser, to recover fees for selling property on foreclosure of a mortgage. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Toole & Wallace, for Appellant.

C. B. Nolan, Attorney General, for Respondent.

HUNT, J.—The defendant Hauser (appellant in this court) foreclosed a mortgage upon real estate belonging to F. R. Wallace, A. M. Thornburgh, and others. An order of sale and execution was duly issued in said case to the plaintiff and respondent, Jurgens, as sheriff. Pursuant to statute, Jurgens, as sheriff, advertised and sold the lands for \$77,100, the defendant bidding them in for the satisfaction of the amount of the claim, including costs. No money was delivered to the sheriff's hands, but the sum bid was credited by the sheriff upon the mortgage indebtedness of the defendant. The agreed question for decision is: Was the sheriff entitled to receive commissions of \$420.50 upon the amount of \$77,100 bid by defendant? Under the statute (§ 4634, Political Code, 1895), the sheriff is entitled to commissions (1) for receiving and paying over money on execution or other process when lands or other property have been levied on and sold, and (2) for receiving and paying over money on process without levy, or when lands or goods levied on are not sold. The commissions allowed him in the latter instance are less than in the former, the legislature evidently having believed that where a sheriff receives and pays over money without being put to the labor and accompanying official risks of levy, or where, if he has made the levy, still he is not obliged to take the further step and risk of selling, in such instances his services are not worth as much as where his duties have compelled him to levy and sell. This discrimination in sheriff's commissions is but a recognition of the extent of his services, and of the gradations in the liabilities which often accrue to a sheriff in the progressive steps of the discharge of his responsible duties under writs of execution, and is an allowance meant to be

commensurate to such services and graduated liabilities. But in both instances enumerated by the statute he is entitled to commissions for receiving and paying over money on process. This being clear, we have only to decide whether a sheriff does receive and pay over money on process when he sells mortgaged property to the judgment creditor at a foreclosure sale.

The attitudes of an ordinary purchaser at an execution sale, and of a mortgagee who has obtained a decree of foreclosure against a mortgagor, and has placed an execution and order of sale of the premises mortgaged in the sheriff's hands, are similar in respect to their respective rights to bid at the sheriff's sale of the mortgaged property. Either may become a purchaser thereat, subject always to the statutes defining the rights of purchasers. (*Insurance Co. v. Cushman*, 108 U. S. 51, 2 Sup. Ct. 236.) Either, if he purchase, must pay over, strictly speaking, to the sheriff, if he demand it, the purchase price and costs, including the sheriff's fees; and the sheriff, in turn, must receive and pay the amount due on the mortgage, with costs; and, if there be any surplus, he may be directed to pay it over to the person entitled thereto, and in the meantime to deposit it in court. The practice of crediting the amount of the mortgagee's bid, if the mortgagee purchase, upon the sheriff's return of his execution, is thus spoken of by Gilfillan, C. J., in *Sharvey v. Iron Co.* (Minn.) 58 N. W. 864: "When an execution creditor bids upon the property levied on, he bids as any one else does, except that, if it be struck off to him, to avoid circuitry of action, and as a matter of convenience, he is not required to go through the ceremony of paying the money to the sheriff, and receiving it back from him. But he is presumed, as any one else would be, to bid the property off at what he deems to be its value; and there is secured to him, by means of the execution and sale, the amount of the bid, less the fees and expenses, by acquiring the title to the property if the sale become absolute, and by actual receipt of the money if there be redemption. Whatever he acquires by the execution and sale is to be deemed a collection, not only as between him and the judgment debtor, but as be-

tween him and the sheriff." Adapting this reasoning to our statutes, we find that the sheriff performed his whole duty in the premises, and that the judgment creditor has, by the levy and sale, acquired that which, as between him and the mortgagor, is money received and paid over on process, and must be likewise regarded as between the judgment creditor and the sheriff who has made the sale. It would be anomalous if the very statute which so explicitly gives the sheriff his commissions where he collects without a sale, and thus generally without much labor, and but slight risk of liability on his bond, should deprive him of all allowances where he performs considerable service, and does make a sale, thus perhaps incurring liability, simply because the mortgagee has voluntarily bid in the property included in the mortgage, and so accepted the realty in lieu of the money. Such a construction is less reasonable, we think, than that which regards the sale by the sheriff as upon a like footing, whether made to the mortgagee or to any other purchaser. We therefore dissent from the recent decisions in *Peery v. Wright* (Utah) 45 Pac. 46, and other cases cited by appellant, and adopt the opposite conclusion sustained by authorities, and thus expressed by the supreme court of Tennessee: "The sheriff did all he was commanded to do by law. He could not do more under his process. Every duty and responsibility enjoined by it were assumed and faithfully discharged; and we think, by a fair and just interpretation of the statute, he is entitled to compensation for his services." (*Arnold v. Dinsmore*, 3 Cold. 235. See, also, *Morse v. Gibbons*, 43 Cal. 377; *Litchfield v. Ashford* (Iowa) 30 N. W. 649.) The judgment is affirmed.

Affirmed.

PEMBERTON, C. J., and BUCK, J., concur.

19	186
91	322

AMES & FROST ET AL., APPELLANTS, v. HESLET ET AL.,
RESPONDENTS.

Submitted January 25, 1897. Decided February 8, 1897.]

*Corporations—Insolvent Assignment with Preferences—Lien
of Creditors.*

CORPORATIONS—Power to Prefer Creditors in Assignment.—An insolvent corporation, in the absence of any statute to the contrary, has the power to make an assignment for the benefit of creditors with preferences.

CORPORATIONS—Trust Fund.—Although the property of a corporation may be a trust fund for its creditors, that does not give such creditors a lien upon such assets.

*Appeal from District Court, Silver Bow County. J. J.
McHatton, Judge.*

ACTION by the Ames & Frost Company and others against James K. Heslet and others to set aside an assignment for the benefit of creditors of the J. Chauvin Northwestern Furniture Company. From a judgment for defendants, and from an order denying a motion for new trial, plaintiffs appeal. Affirmed.

Statement of the case by the justice delivering the opinion.

The J. Chauvin Northwestern Furniture Company, a corporation of Butte, Mont., being unable to pay its debts, and being threatened by W. A. Clark & Bro., one of its largest creditors, with an attachment suit, executed a general assignment for the benefit of its creditors, in which said W. A. Clark & Bro. and several other creditors were preferred. Plaintiffs, as judgment creditors of the corporation, instituted an action to set aside this assignment. The following stipulation was entered into between the plaintiffs and defendants in the lower court: "It is agreed between the parties hereto that the question to be tried before the court is whether an insolvent corporation, under the law, can make an assignment of its entire property and assets, and in such an assignment prefer one creditor to another, under the facts hereinbefore recited. This is the only issue to be determined in this cause." Judg-

ment was rendered for the defendants, and plaintiffs appeal from the judgment and the order denying a motion for a new trial.

Forbis & Forbis and *Bangs, Wood & Bangs*, for Appellants.

Corbett & Wellcome, for Respondents.

BUCK, J.—The determination of this appeal depends upon whether or not an insolvent corporation can make an assignment for the benefit of creditors, with preferences. Appellants' counsel insist that such an assignment is void. Their reasoning is substantially as follows: The assets of the corporation constitute a trust fund for its creditors, to which equitable liens at once attach in favor of each and every creditor upon insolvency. An insolvent corporation stands upon a different footing from an insolvent individual, because with insolvency the legal existence of the former is virtually at an end, while in the case of the latter he may subsequently accumulate property and pay all his debts. They and the judges and text writers who support this view urge that it is most unjust and illogical to hold that such a corporation, by an assignment of its entire property,—an act which in itself prevents any resumption of business operations,—should be permitted to favor one lienholder at the expense of another.

There are innumerable authorities replete with arguments for and against this contention, and it would be an act of supererogation for us in the present opinion to enter into an elaborate discussion of a subject which has been so thoroughly exhausted. For the details of the arguments pro and con, we cite the following, among the many called to our attention: 2 Mor. Priv. Corp., §§ 782, 786, 863; 5 Thompson on Corporations, §§ 6466, 6492-6496; *Lyons-Thomas Hardware Co. v. Perry Stove Manufacturing Co.* (Tex. Sup. 22 Lawy. Rep. Ann. 802, note; s. c. 24 S. W. 16; *Thompson v. Lumber Co.* (Wash.) 30 Pac. 741; *Rouse v. Bank*, 46 Ohio St. 493, 22 N. E. 293; 4 Am. & Eng. Ency. Law (1st Ed.) page 220, note; 2 Cook, Stock, Stockh. & Corp. Law, § 691. The great

weight of authority is against appellants, and, in our opinion, is based on the better line of reasoning. In many of the cases cited, particularly those in federal courts, the statement is made that the assets of a corporation are a trust fund for its creditors; but it does not follow that even these courts intended by this expression to hold that creditors, by virtue of their mere attitude as such, have any lien upon the actual, tangible property of a corporation,—that property which belongs to it for its business operations, and which is primarily liable for its debts, as distinguished from any secondary liability of directors or stockholders. In our opinion, there is no such lien. The trust-fund doctrine, as invoked by appellants to sustain it, impresses us as an unsubstantial theory, constructed of judicial expressions selected without regard to their context or the facts in reference to which they were uttered. We refer, of course, to the cases where the adoption of the doctrine only appears inferentially. All this reasoning against upholding preferences in assignments by insolvent corporations should be addressed to legislatures, rather than the courts. The policy of allowing such preferences may be pernicious, even more so than that of allowing an insolvent individual to prefer creditors; but in the one class, as in the other, it is for the legislature to decide the question of policy, not the courts. There was nothing in the statutes of Montana in force when this controversy arose forbidding such assignments; and, according to a large majority of the authorities, insolvent corporations and insolvent individuals are upon the same plane at common law in respect to them. As to any distinction between the status of a solvent and insolvent corporation in this connection, this court held in *Gans v. Switzer*, 9 Mont. 408, 24 Pac. 18, that the fact that an insolvent corporation had transferred all its property to one of its creditors, and abandoned business, did not dissolve it. For these reasons, the order denying the motion for a new trial and the judgment of the lower court are affirmed.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

GERRY ET AL., RESPONDENTS, v. THE BISMARCK BANK
ET AL., APPELLANTS.

[Submitted January 27, 1897. Decided February 8, 1897.]

19	191
21	549
19	191
80	250
19	191
31	545
31	553
31	567
19	191
25	361

Corporation—Fraudulent Act of Directors—Mortgage of Mining Claims—Action by Minority Stockholders.

The president of a mining corporation bought a mine adjacent to the property of the Company for \$45,000. He and another director "C" who together owned or controlled nearly two-thirds of the stock of the company then falsely represented to the plaintiffs who are stockholders and one of whom is a director of the company, that the mine had cost \$85,000 and was actually worth \$110,000, that unless the company bought the mine it would be involved in an expensive litigation, and that if the plaintiffs did not give their consent to the purchase and to the execution of a mortgage, they had control of enough stock to act without it. There were five directors of the company. The plaintiffs relying upon the truthfulness of the representations agreed to allow their stock to be voted in favor of a mortgage to be executed by the company in carrying out the purchase. Subsequently a meeting of the board of directors was held at which there were present four directors including the president and his co-conspirator, and thereupon a resolution was adopted to purchase the property from the president, he not voting; and at the same meeting it was also resolved that a stockholders' meeting should be called to authorize the execution of a mortgage upon the property of the company, including the mine thus bought, to secure the purchase price of the latter. The capital stock of the company is divided into 300,600 shares; at this meeting of the stockholders 288,050 shares were represented; of which the president owned 47,501 shares, and 133,395 shares were owned by the wife of "C," and were controlled by "C;" there were no votes cast against the resolution to mortgage, and only 220,548 were cast in its favor, as the president did not vote and as "C" did not vote the one share held by him. The mortgage was executed to a trustee for the bondholders; upon default in the mortgage, foreclosure proceedings were commenced; thereupon plaintiffs who are minority stockholders and one of whom is a director, brought this suit to enjoin the prosecution of the foreclosure. *Held*, that the purchase by the board of trustees was fraudulent and invalid as to plaintiffs; *Held*, further, that the mortgage was fraudulent and void under the laws of Montana, because the transaction would not have received the number of votes required, if "C" had not caused the shares of his wife to be voted in its favor.

SAME—The directors of a corporation are trustees, and cannot use their position for their personal profit.

SAME—After obtaining possession of the mine, the company under the management of "B" and "C" expended more money than was expended when the company was earning dividends; thus an indebtedness was incurred which brought about the foreclosure. *Held*, that under the facts of this case "B" having gained an advantage through his own wrong, it was not necessary for plaintiffs to first offer to restore the mine to "B" or place him in *status quo*.

SAME—*Held*, that under the facts in this case, plaintiffs could bring this suit without proving or alleging a refusal of the board of directors so to do.

Appeal from District Court, Silver Bow County. J. J. McHatton, Judge.

ACTION by Walter S. Gerry and others against the Bismarck Bank of North Dakota and others. From a decree for plaintiffs and an order denying a new trial, defendants appeal. Affirmed.

Statement of the case by the justice delivering the opinion.

This action was instituted by plaintiffs, a minority of the stockholders of the Bannister Mining Company, a corporation operating in Silver Bow county, Montana, to set aside a deed conveying a certain mining claim to said corporation, and also a mortgage executed by it to a trustee to secure the purchase price of said claim. The defendants are the corporation, four of its five directors, the trustee named in the mortgage, and a stockholder. Certain allegations of the complaint are as follows: Plaintiffs are the owners of about 75,000 shares of the capital stock of the Bannister Mining Company. During the year 1891, Bannister was a trustee and the president of said company, Child was a trustee and treasurer, Anderson was a trustee and secretary, and Beattie was a trustee. In the month of October, 1891, Bannister and Child conspired to cheat and defraud the Bannister Mining Company, and particularly the plaintiffs. In that year Bannister and Child went to Boston, and represented to plaintiffs that Bannister was the owner of the Valley lode claim; that he had paid \$95,000 for it; that its value was \$110,000; that the vein of the Tecumseh claim (the mine owned and theretofore worked by the Bannister Mining Company) was dipping beneath the Valley, which lay adjacent to the Tecumseh, and that it was necessary for the company to purchase the Valley claim in order to avoid litigation; that they and the other stockholders residing in the West could purchase said Valley claim whether they (plaintiffs) would agree to it or not, but that they desired plaintiffs' consent for the sake of harmony. That all of these allegations were false, and known at the time to be so by said Bannister and Child. That said Bannister had not paid \$95,000 for the Valley claim, but, on the contrary, had not paid over \$35,000 for the same, and that its value did not exceed \$25,000. It

is further averred that plaintiffs believed and relied upon the false representations made to them, and that in pursuance of the conspiracy aforesaid, on November 3, 1891, a meeting of the board of trustees or directors of the Bannister Mining Company was held at Helena, Montana; that there were present at said meeting said Bannister, said Child, and the defendant trustees Beattie and Anderson; that, at said meeting of the trustees, said Child, said Beattie and Anderson (the latter two well knowing of the fraud, and being parties to the conspiracy), voted to purchase the Valley claim; that on December 17, 1891, a stockholders' meeting was held, for the purpose of authorizing the execution of a mortgage on the Valley lode claim, and the Tecumseh mine as well, to secure the purchase price of said Valley claim; that the number of shares voted at said meeting, through said fraud and conspiracy, was 190,898; and that, therefore, there was no legal authorization for the execution of the said mortgage. The complaint, proceeding, states that the mortgage so illegally voted upon was executed to the defendant the Bismarck Bank, as a trustee for said conspiring trustees; and that, in furtherance of the conspiracy, subsequent to its execution the trustee defendants misappropriated funds of the Bannister Mining Company, and thereby procured a default in the sinking fund provided for in the said mortgage; and that the defendant the Bismarck Bank, as trustee, is about to foreclose and sell the mortgaged property. The prayer for relief is that the foreclosure of the mortgage be restrained; that the deed and mortgage both be declared null and void; and that the conspiring trustees be required to account for all sums due by them to the company by reason of the fraud aforesaid. The answer of the defendants denied the allegations of the complaint. The case was tried to the court, without a jury. Judgment was rendered for plaintiffs. The finding, as appears from the decree of the lower court, is "that the allegations in the plaintiffs' complaint, except as to the allegations that the defendants Bannister, Child and Beattie had fraudulently appropriated to their own use or misapplied any funds of the Bannister Mining Com-

pany, in any sum whatever, were fully sustained and proved." The appeal is from the order denying a motion for a new trial, and from the decree.

McConnell, Clayberg & Gunn, for Appellants.

J. F. Forbis, for Respondents.

BUCK, J.—After a careful review of the evidence in the record, we are satisfied that from what the lower court was justified in finding to be the truth where the testimony was conflicting, and from what is virtually conceded to be the truth by the parties to the suit, the following condition of facts is presented: E. D. Bannister was a trustee and the president of the Bannister Mining Company, and the owner of 47,501 shares of the capital stock. W. C. Child was a trustee, and its treasurer, and the owner of 1 share of the capital stock, his wife, Mary Child, being the owner of 133,395 shares. E. W. Beattie was a trustee, and the owner of 10,000 shares. J. W. Anderson was a trustee, and its secretary, and the owner of 1 share of stock. Bannister and Child were the directors and officers who superintended and directed the operations of the corporation. The Valley, an unpatented mining claim, was adjacent to the Tecumseh, the patented mine belonging to the Bannister Mining Company, which had yielded some \$66,000 in dividends. The value of the Valley claim was largely speculative, and depended chiefly upon its proximity to the Tecumseh mine. In the progress of development of the Tecumseh mine, Bannister, in his official capacity, became aware that legal complications might possibly result from the fact that the vein of the Tecumseh showed a tendency to dip into the Valley ground. There was no certainty, however, that these complications would arise. He thereupon acquired title in his own name to the Valley, paying or agreeing to pay therefor the sum of \$45,000. This was all it was ever worth. Under the pretext that the presence of himself and Child (whom he had taken into his confidence) was necessary in Boston, Massachusetts, to manage the exchange of new for old

certificates of stock held by owners residing there, the two men went to that city, at the expense of the company. Taking advantage of the trust reposed in them by virtue of their official positions, and with intent to deceive, they represented falsely to certain of the plaintiffs that Bannister had paid \$95,000 for the Valley claim; that the Valley claim was actually worth \$110,000; that it was necessary for the Bannister Mining Company to acquire it at the last-named price, for the protection of the lateral rights of the Tecumseh vein; and that, if plaintiffs refused to consent to the purchase, they held control of sufficient stock of the company to buy the Valley without their co-operation. The plaintiffs to whom these representations were made had a reasonable right to, and did, rely upon the truth of the same, and subsequently suffered their shares to be voted, and made no opposition to the transaction. One of the plaintiffs, W. S. Gerry, was a nonresident director of the company. Shortly after the return of Bannister and Child to Montana, a meeting of the board of trustees of the Bannister Mining Company was held, to make the purchase of the Valley claim. The directors present at this meeting were Bannister, Child, Anderson and Beattie. A resolution was passed accepting a written proposition of Bannister for the sale of the Valley claim for \$110,000. Bannister did not vote on this resolution, but Child did. The proposal for the sale recited that the purchase price, in the opinion of Bannister, was worth \$110,000. Bannister, as president, appointed Child and Beattie as a committee to investigate and report upon the proposition of sale. This committee reported in favor of the purchase at the same meeting. The proceedings of the meeting indicate that they were merely *pro forma*. At the same directors' meeting it was resolved that a stockholders' meeting should be called for the purpose of obtaining authority to mortgage the Tecumseh and Valley properties to secure the purchase price of the latter. Pursuant to this call, shortly afterwards a stockholders' meeting was held, and the mortgage aforesaid was authorized. At this stockholders' meeting, 268,050 of the 300,000 shares of the company's

capital stock were represented, and 220,548 shares were voted in favor of the authorization. There were no shares voted against it. Bannister did not vote his 47,501 shares. Child abstained from voting the 1 share held in his name, but the shares of Child's wife (133,395 in number) were voted by J. W. Anderson, clearly at the instigation of Child himself. Child had his wife assign the stock to one Reeves, who thereupon gave a proxy to vote the same to said Anderson.

The law of Montana (§ 493, Compiled Statutes, 1887) required at least three-fourths of the entire capital stock to be represented at this meeting, and made at least two-thirds of the entire capital stock necessary to any authorization of the mortgage. Without Bannister's 47,501 shares there would not have been a three-fourths representation of the capital stock at the meeting. Under these circumstances, the deed to the Valley mine was executed to the company, and the company executed a mortgage to secure the purchase price thereof. Thereafter, under the management of Bannister and Child, a large sum of money was spent in developement work on the Valley and Tecumseh mines,—a great deal more than had been expended during the period when the Tecumseh mine paid dividends. There was a default in the sinking fund provided for in the mortgage. The testimony is not sufficient to support the lower court in finding that Beattie and Anderson took part intentionally in any conspiracy with Bannister and Child. But, in the view we take of the law applicable to the facts before us, the allegations as to any fraud on the part of Beattie and Anderson become immaterial. From an evidentiary standpoint, it is well to note that Anderson was the owner of only one share of stock, and Beattie's interest was greatly disproportionate to the combined holdings of Bannister and Child's wife.

Was the purchase by the board of trustees of the Valley mine a valid one? We must answer the question in the negative. Of the four directors who were present at the meeting when the purchase was made, two were conspirators. On the theory of the innocence of the other two, their votes should have been cast differently had they been aware of the actual

condition of affairs. So, too, the authorization of the execution of the mortgage at the stockholders' meeting is vitiated by fraud. The shares of the wife of Child should not have been voted as they were. Clearly, had the plaintiffs to whom Bannister and Child made the misrepresentations known of the fraud, their shares of the stock would not have been voted as they were. Add the number of shares of the actually deceived plaintiffs (even accepting appellants' estimate of them at about 20,000 only) to the disqualified 133,395 Child shares, and it appears at once that the result, 155 395, deducted from the 220,548 shares voted, leaves only 65,153 shares legally voted in favor of the mortgage. This number falls far short of the two-thirds vote necessary under the statute to have authorized it.

Appellants maintain that the lower court must have rendered its decision upon the theory that Bannister was guilty of constructive fraud,—fraud which the law would imply from any violation of his fiduciary relation as a trustee for the stockholders; and that, inasmuch as plaintiffs' complaint was wholly on the theory of actual fraud, relief cannot be afforded in the present suit for any disregard by Bannister of his fiduciary obligation as to profits. We do not disagree with the general principle that even under our form of procedure the proof must substantially correspond with the allegations relied on for relief, and that a plaintiff cannot allege one cause of action, and then, even if the proofs might justify it, obtain relief on one which is essentially different in character. (See Pomeroy on Code Remedies, § 553 *et seq.*) But does the complaint before us set forth different theories for recovery? We think not. It contains an averment of a fraudulent conspiracy, and the fiduciary relationship of Bannister and Child to the company is averred only as one of the means whereby the fraud was perpetrated. The latter averment supports the former. The two blend naturally into the gist of the action. Even if any line of demarkation could be preserved between the fraudulent conspiracy as one theory in this complaint, and the violation of the duties of the fiduciary relationship as an-

other, still the two would not be essentially different. Fraud would be the basis of recovery in each.

But it is idle to pursue any such phase of the argument in the view we entertain of the evidence and the cause of action in the complaint. The lower court found, and with sufficient evidence to sustain it, both actual and constructive fraud,—the latter merely as incidental to the former. The determination of the appeal is not difficult. That a trustee should not be allowed to profit by his trust is a well-known fundamental doctrine of equity. No evasions, no technical subtlety of reasoning, no empty distinctions, should be tolerated when the assertion of this principle becomes necessary. It is true that when the motives of a trustee in the neglect of his duty are not essentially bad, or are readily reconcilable with ordinary honesty of purpose, certain courts have applied this rule leniently. It is true that, when no patently wilful violation of duty appears, many judges have shown a disposition to check its force. It is true that weak toleration from the bench of frail, but penitent, humanity, has often apparently robbed the principle of its very life. But such precedents serve only to increase plausible devices for evading its consequences. They encourage the natural tendency of designing selfishness to substitute the vague expression “business enterprise” for “business honesty.” When, however, a case arises like the one before us, where, to an attempt to make profit through a trust relation, there is added the element of actual fraudulent representations, in order to attain the end, then, certainly, no leniency should mingle with the application of the principle. It must be administered sternly and unhesitatingly. Appellants cannot justly complain of the judgment. In his own testimony, the witness Bannister states: “I never told any person, and there is no person who ever knew exactly, what the Valley cost me until I was interrogated here in court. I gave them (plaintiffs) no figures as to the cost of the Valley. I said: ‘I am not going to tell you what this cost me. That don’t make any difference. This (\$110,000) is what it is worth.’” Again, the following question was put to him:

“So it was not the good of the company you were looking at so much as the good of E. D. Bannister?” His answer was: “The Bannister family, yes sir; they are first.”

Appellants urge that Mr. Bannister must first be put in *statu quo* before relief can be granted in this suit. Having gained an advantage, wrong from its very inception, he is in no position to make any such demand.

The allegations of plaintiffs' complaint and the evidence answer the contention that, before the plaintiffs could institute this suit, it was necessary for them to request the board of directors to institute an action, and to prove a refusal on its part. With two of the four directors in charge of the affairs of the corporation conspiring, such a demand would have been idle. The history of the suit subsequent to the filing of the complaint shows that all four of the resident directors united in resisting the assertion of the corporation rights, and the utter futility of any such demand is thus made more manifest. (See Pomeroy on Equity Jur., § 1095.)

We cannot pass upon any rights which the American National Bank may have acquired under this mortgage, as the holder of bonds for purposes of collateral security. The said bank is not a party to this suit, and Bannister's sworn answer asserts that he is the sole owner of all said bonds.

The order denying the motion for a new trial is sustained. The judgment of the lower court is affirmed, but the case is remanded, with directions to the district court to modify the findings as to Anderson and Beattie, recited in the decree, in accordance with the views herein expressed.

Modified and affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

THE NATIONAL CASH-REGISTER CO., RESPONDENTS,
v. BROWN ET AL., APPELLANTS.

[Submitted February 8, 1897. Decided February 15, 1897.]

Partnership—Liability of Retiring Partner to Firm Creditors.

PARTNERSHIP.—A retiring partner is liable to firm creditors, although in the agreement of dissolution the remaining partner assumes all firm indebtedness and retains all firm assets.

SAME.—The liability of the retiring partner to creditors is that of a principal and not that of a surety.

SAME.—The fact that the firm creditor releases an attachment on property belonging to the remaining partner who is insolvent, constitutes no defence in an action against the retiring partner, although the release was made against his protest and with knowledge of the insolvency.

Appeal from District Court, Park County. Frank Henry, Judge.

ACTION by the National Cash-Register Company against J. A. Brown and R. D. Alton, doing business as J. A. Brown & Co. Judgment for plaintiff and Alton appeals. Affirmed.

Statement of the case by the justice delivering the opinion.

This is an action commenced in a justice of the peace's court in Park county, by the plaintiff, to recover judgment against the defendants on four promissory notes, described in the complaint. In the justice's court the defendant J. A. Brown defaulted, and judgment was entered against him. The defendant R. D. Alton appeared, and filed a separate answer, which is in substance as follows: It admits the execution of the notes sued on by the firm of J. A. Brown & Co., as alleged in the complaint. Defendant Alton, for a further and separate defense, alleges that on the 7th day of April, 1894, and for a long time prior thereto, he and the defendant J. A. Brown were partners, doing business under the firm name and style of J. A. Brown & Co., at Livingston, Park county; that, on said day, said firm was dissolved, by mutual consent, by an

agreement in writing, by the terms of which agreement defendant Alton retired from said firm, and the defendant Brown continued the business conducted by said firm, took all the assets thereof, and agreed to collect the accounts due to, and pay all the indebtedness of, said firm of J. A. Brown & Co.; that, at the time of the dissolution of the firm, the notes in suit were outstanding against said firm; that thereafter, on the 19th day of November, 1894, the plaintiff commenced an action in the justice's court of Livingston township, in said county, against the defendants, upon the identical notes set forth in the complaint in this suit, by filing said notes in said justice's court, and procuring a summons to be issued thereon; that, at the time of the commencement of said suit, the plaintiff caused a writ of attachment to be issued out of said justice's court, which writ was delivered to the constable of said township, and which was served by said constable by levying upon sufficient property of the defendant J. A. Brown to fully pay off and satisfy said notes and costs; that, at the time of the commencement of said suit in said justice's court, the plaintiff and its attorneys were informed and knew of the dissolution of said firm, and that said J. A. Brown had succeeded to all the assets of the firm, and had contracted to pay the plaintiff's said demands, together with all the other indebtedness of said firm. Defendant Alton further alleges that, at the time of the commencement of the said suit and the issue and levy of said attachment, the said defendant Brown was insolvent, and that this fact was well known to the plaintiff and its attorneys; that after the commencement of said suit and levy of said attachment, and while the constable had sufficient property in his possession under said writ of attachment to satisfy the plaintiff's demand, this defendant notified the plaintiff and its attorneys that the said firm of J. A. Brown & Co. had been dissolved, that said Brown had all of the assets of the firm, and had agreed to pay all of its indebtedness, including the plaintiff's demand, and urged and requested and demanded the plaintiff to proceed with said suit, and make the amount of its claim out of the property of the defendant J. A. Brown which

was then held under attachment; that said plaintiff, notwithstanding the urgent requests and demands of this defendant, and contrary to his expressed wish, and with full knowledge of all the facts aforesaid, released the property of said defendant Brown which was held under said writ of attachment, and dismissed said suit; that, subsequent to the release of said attachment and the dismissal of said suit, the defendant Brown made an assignment for the benefit of his creditors, and at all times since has been, and now is, insolvent and irresponsible financially. To this answer of defendant Alton, the plaintiff filed a general demurrer, which was overruled by the justice; and, the plaintiff having elected to stand on his demurrer, judgment was rendered by said justice in favor of defendant Alton, from which judgment plaintiff appealed to the district court. In the district court the case was again heard on the demurrer of plaintiff to the separate answer of defendant Alton, and the same was sustained; whereupon defendant R. D. Alton elected to stand on his answer, and judgment was entered against him. From this judgment, defendant Alton appeals.

Campbell & Stark, for Appellants.

“Where a partnership is dissolved and one partner purchases the interest of the other in the partnership property, and assumes and agrees to pay the partnership debts, he thereby becomes in equity the principal debtor as to such debts, and the other his surety, and a creditor having notice of such agreement is bound by such relationship.” (*Colgrove v. Tallman*, 67 N. Y., 95, 23 Am. Rep. 90.) “Where one member of a partnership retires from it, agreeing with the others that they should pay the firm debts, the retiring partner, as to creditors having knowledge of the agreement, is a surety.” (*Gourley v. Tyler et al.*, (Texas), 15 S. W. 731; citing *Brandt on Sureties*, 823; *Baylies on Sureties*, pp. 481, 482 and 40.) The same proposition is upheld by the following authorities: (*Kinney v. McCullough*, 1 Sand. Ch. 370; *Johnson v. Emerick*, 70 Mich. 215; *Barber v. Gilson*, 18 Nev.

89: *Wendlandt v. Sokre* (Minn.) 33 N. W. 700; II Daniel's Neg. Inst. (Third Ed.) § 1300a; 24 Am. & Eng. Ency. Law, 721 and note; 17 *Id.*, 1129; *Williams v. Boyd*, 75 Ind. 286; *Johnson v. Young*, 20 W. Va. 614; *Chandler v. Higgins*, 109 Ill. 602.) "Where a lien is fixed, any act of the creditor which discharges that lien, without privity of the surety, discharges him." (*Curan v. Colbert*, 46 Am. Dec. 427; *Dixon v. Ewing*, 17 *Id.* 590; *Bank of Missouri v. Matson*, 72 *Id.* 208; *Robeson v. Robert*, 83 *Id.* 308; *Mingus v. Daugherty*, 43 Am. St. Rep. 354.)

E. C. Day, for Respondent.

PEMBERTON, C. J.—The appellant contends that by the terms of the dissolution of the partnership firm of J. A. Brown & Co., as set out in his separate answer, he became a surety for the payment of the firm's debts, and that he was entitled to the rights of such surety from the creditors of the firm having actual notice of the terms of the dissolution; and, further, that the plaintiff, having brought suit by attachment against the firm, and having attached sufficient property in the hands of Brown, the principal, to satisfy its demand, and subsequently, without the consent and against the protest of the surety, having released the attachment and dismissed the suit, thereby released appellant, the surety, from all liability on the notes sued on.

The questions raised by the contention of the appellant were fully discussed in *Rawson v. Taylor*, 30 Ohio St. 384, and the conclusion reached that "a retiring partner remains liable for all the existing debts of the firm, to the same extent as if he had not retired. An agreement between him and the remaining partners, or with the new firm that succeeds, that they will assume and pay all such debts, while valid as between the partners, has no effect upon the creditors of the old firm, unless they become parties thereto." In *Fensler v. Prather*, 43 Ind. 119, a case involving the question under discussion, it was said: "Two partners, owing debts and having assets, dissolve partnership; and, by agreement, one partner was to retain all the assets, and pay all the debts, and manage and

close up the business. The partner who had withdrawn from the management of the business, desiring a discharge from further personal liability on a certain note made by said firm, and held by one of the creditors thereof, acquainted such creditor with the facts of the partnership arrangement, and proposed to pay him one-half the amount of said note, the creditor to relieve him from further liability, and look to the effects in the hands of the former partner and to such partner personally for the other half, which proposition the creditor accepted, and one-half the amount of said note was then paid accordingly. *Held*, that such part payment was not a sufficient consideration for the promise to release the party making it as to the remainder." In *Shriver v. Lovejoy*, 32 Cal. 575, a case almost exactly like the one at bar, the court said: "The plaintiff sued Lovejoy (the surviving partner of Lovejoy & Co.) and Grandvoinet upon a joint and several promissory note made by Lovejoy & Co. Grandvoinet relied for a defense mainly on the fact that Lovejoy & Co. were the principal debtors; that he was only their surety; and that the plaintiff, after having commenced this action and attached sufficient property of Lovejoy to satisfy the demand, released the property from the attachment, and the same was attached by other creditors of Lovejoy. The court gave judgment for the plaintiff. All the makers of a joint and several promissory note, whatever may be their true relation between themselves, stand, as to the payee, as principals. The promise of each is an absolute and primary promise, not a conditional or secondary promise. The creditor is not interested in knowing the relation of the makers with each other. In a suit on the note, he ought not to be delayed by an investigation into matters which do not concern him." And it was held that the facts alleged constituted no defense. (*Johnson v. Emerick*, 70 Mich. 215, 38 N. W. 223.) This court in *Smith v. Freyler*, 4 Mont. 489, 1 Pac. 214, fully discusses the questions here presented, and collates the authorities. In that case we said: "When a surety signs a promissory note, his promise is absolute and unconditional to pay the same when it becomes due;

and there is no escape from this promise unless the payee or holder releases him. He does not promise that he will pay if the payee or holder fails to collect the note by an action against the principal. The payee or holder does not receive the note with an implied promise that he will exhaust his remedy against the principal before proceeding against the surety. The obligation of the surety is to pay according to the terms of his promise, and he may protect himself by paying, and then proceeding against the principal, and that is his remedy. * * * The authorities are decidedly in favor of the proposition, in absence of any statutory provision controlling it, that if, after the debt is due, the surety request the creditor to sue the principal, who is then solvent, and the creditor fails to do so, and the principal afterwards becomes insolvent, the surety is not thereby discharged. And if there were no authorities on the subject, considering the nature of the obligation of a surety, we do not well see how the contrary could be maintained. The contract of the surety to pay is as absolute as that of the principal, and he cannot change his absolute promise into a conditional one to pay, providing the creditor cannot collect from the principal. The averment in the answer that the plaintiff theretofore agreed to, and did, release the defendant from all liability on the note, is the averment of a legal conclusion; and the further averment that the plaintiff then and there told the defendant to rest easy, that he would not look to him for the payment of the note, but that the principal was good enough for him, and that he would trust him for the payment thereof, is a promise without a consideration, and would not have prevented the plaintiff, the payee, from at once commencing action against the surety to collect the note." We are aware that there are some authorities which hold with appellant's contention; but recent authorities draw a marked distinction "between cases where the relation of principal and surety existed *inter se* at the time the obligation was entered into, of which the creditor had knowledge, and a case of joint principals *inter se* at the date of the obligation, and a subsequent agreement between the joint

debtors by which, as between themselves, one becomes a surety for the other, of which subsequent arrangement the creditor had knowledge." (*Rawson v. Taylor, supra; Swire v. Redman*, 1 Q. B. Div. 536.)

We are firmly of the opinion that one obligor cannot change his relation to his creditor by any agreement with his joint obligor without the creditor's consent. In view of the foregoing authorities, we are of the opinion that the answer of appellant did not state facts sufficient to constitute a defense, and that there was no error in the action of the court in sustaining the demurrer thereto. The judgment appealed from is affirmed.

Affirmed.

HUNT and BUCK, J.J., concur.

STATE OF MONTANA, APPELLANT, v. GRAY ET AL.,
RESPONDENTS.

[Submitted February 8, 1897. Decided February 15, 1897.]

Criminal Law—Information—Gaming—Question of Fact.

INFORMATION FOR CRIME OF CARRYING ON GAMBLING WITHOUT A LICENSE.—Under laws 15th Session, page 75, the essence of the crime is the keeping of a place where a game (mentioned in the statute) is dealt or played for money without a license; and where the keeping of such a place for such purpose without a license is sufficiently charged, the information is not demurrable because it also alleges that defendants kept the place as employes of some one else.

SAME—Whether or not the game charged in the indictment is one for which no license can be issued under the Hunt law (above cited) is a question of fact for the jury.

Appeal from District Court, Silver Bow County. William O. Speer, Judge.

INFORMATION against the defendants, W. Gray and others, for keeping and maintaining a gambling house, or place where gambling is carried on for money, without a license. The defendants filed a general demurrer, which was sustained by the court, and the defendants were discharged. The state appeals. Reversed.

Statement of the case by the justice delivering the opinion.

The material part of the information charged defendants with "Intentionally and knowingly conducting, keeping, and maintaining a certain room and house in which the defendants did keep and carry on and maintain, a certain game of chance and gambling game, called 'fan tan,' or 'tan,' or 'tan tan,' the said game being a game of chance and gambling game, a more particular description of which was to the county attorney unknown, etc., which said game was dealt and played for money, and checks and representatives of money, * * * and that they, said defendants, then and there being the employes and servants of one John Doe Williams in the keeping, maintaining, and conducting and carrying on of said game in said room or place, as aforesaid, and they, the said defendants, then and there well knew that the said John Doe Williams had not secured a license," etc.

C. B. Nolan, Attorney General, for the State.

HUNT, J.—The record does not show why the district court sustained the general demurrer. Possibly it was because the information first charges the defendants with keeping the room, and in the latter part thereof sets forth that they kept, maintained, and carried on the game referred to in the room, knowing that their employer had not secured a license for keeping and maintaining the house or room where the game was dealt or played for money. There may be some ambiguity of expression in the information, but the facts pleaded are that the defendants kept and maintained the house where "fan tan" was played, and kept and maintained and carried on the game in the house, doing all such acts as the employes of John Doe Williams, whom they well knew had not secured a license for keeping and maintaining a gambling house, as required by law. But mere uncertainty or ambiguity of expression, where the charge is as plainly averred as in this case, will not warrant a court holding that the facts stated do not constitute a public offense. The essence of the offense charged under section 10 of an act concerning licenses (page 75, Laws 1887, 15th Ex. Sess.), is the keeping of the place where the

game is dealt or played for money without first paying a license; and, where the offense of keeping such a place for such a purpose is sufficiently charged, it does not vitiate the information to allege that the keepers maintained and carried on the place as the employes of another. (*Chase v. People*, 2 Colo. 509; *Wren v. State*, 70 Ala. 1; *People v. Sam Lung*, 70 Cal. 515, 11 Pac. 673.)

It is admitted by the learned attorney general that if the ruling of the district court was made because the game of "fan tan" is prohibited by the provisions of the "Hunt Gambling Law of 1889," the demurrer to the information was well taken, inasmuch as no license could be obtained for carrying on a game prohibited by that law. We find, however, that in the list of games particularly prohibited by the provisions of section 1 of the law of 1889 called the "Hunt Law," there is no specific mention of "fan tan;" nor is it charged in the information herein that the game of "fan tan" is really one of the games prohibited by that law, but called by the different name of "fan tan," or that it is even similar to one of such prohibited games, or that it is a fraudulent game, or that it in any way violates the provisions of the law in force. On the contrary, the information is drawn upon the assumption that "fan tan" is a game which may be played after procuring a license. It may be that the game of "fan tan" is known by persons familiar with gambling games, and it may be that it is one of the games fairly within the prohibited games enumerated in the Hunt law; but, if all this is true, we certainly do not know it, and, without evidence of what it really is, we cannot be expected to judicially know that it is a prohibited game. True, there is a lucid explanation of the game of "fan tan" by Judge Deady in the case of *In re Lee Tong*, 9 Sawy. 333, 18 Fed. 253; but, in our opinion, the proper way to ascertain the facts concerning the methods of playing the game, and the object thereof, is on the trial, where witnesses may testify to such facts. Thus alone can it be shown whether it is a lawful gambling game or a prohibited one. Whether or not the game conducted or carried on was the

game of "fan tan" is to be determined by the jury upon the evidence before them. (*People v. Sam Lung, supra.*) The province of the court in such a case seems to be to instruct the jury what constitutes the game charged to have been played or conducted. This the court should do after it has heard evidence. But, as said, whether the game played was the one charged or not, the jury are to say. (*People v. Carroll*, 80 Cal. 153, 22 Pac. 129.) These views do not conflict with the case of *Kennon v. King*, 2 Mont. 437.

The demurrer should have been overruled. The case is therefore remanded, with directions to the lower court to set aside the order and judgment sustaining the demurrer.

Reversed.

PEMBERTON, C. J., and BUCK, J., concur.

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STATE RESPONDENT, v. WROTE ET AL., APPELLANTS.

[Submitted February 8, 1897. Decided February 15, 1897.]

Bail Bond—Action Against Sureties—Pleading.

Joseph Smith was committed by a justice of the peace of Carbon county on a charge of grand larceny, and held to appear at the district court, the bond was fixed at the sum of \$1 000, and the defendants were the sureties thereon. The condition of the bond was, "if the said Joseph Smith shall be — at the next term of said court on the first day thereof — and not depart therefrom without the order of the said court, and if convicted of said crime, will render himself in execution thereof, then the obligation to be void, otherwise to be in full force and effect." Smith failed to appear upon being duly called; *Held*, that in an action against the sureties, the complaint does not have to state the manner of committing the crime of grand larceny, it being sufficient, in that respect, if it appear from the complaint that an information was filed in the said court charging Smith with the crime of grand larceny; *Held* also that the complaint need not allege that Smith made default without excuse.

SAME.—*Held*, that, if Smith had an excuse for not appearing, he should have moved to set aside the forfeiture.

SAME.—An allegation that "Smith was called and failed to appear in the district court" is equivalent to an averment that his default for not appearing was entered of record. (§ 258 Criminal Practice Act.)

SAME.—It appearing from the complaint that the information was for grand larceny, it does not need to appear that the crime charged in the information was the same crime for which he was held to answer.

SAME. It is not necessary to state in the complaint that the bond was "certified by the sheriff to the clerk of court, and by him filed and recorded."

Appeal from District Court, Carbon County. Frank Henry, Judge.

ACTION by the state against Michael Wrote and others. Judgment for the state, and defendants appeal. Affirmed.

Statement of the case by the justice delivering the opinion.

It appears from the pleadings and the record in this case that on the 21st day of May, 1895, in the county of Carbon, one Joseph Smith was committed by a justice of the peace on a charge of grand larceny, and held for his appearance to the district court, in the sum of \$1,000, to answer said charge, and that the appellants in this case became the sureties on the bond of said Smith for his appearance. Said Smith failed to appear at the district court in accordance with the condition of his bond, which was forfeited therefor, and this suit is brought to recover the amount of said bond, of the sureties thereon. The defendants appeared and filed a demurrer to the complaint, on the ground that the same did not state facts sufficient to constitute a cause of action against the defendants, or any of them. The court overruled the demurrer, and the defendants declining to answer, and standing upon their demurrer, judgment was entered against them in accordance with the prayer of the complaint. The appeal is from the judgment.

O. F. Goddard, for Appellants.

The complaint does not show, that the information mentioned in the complaint was filed within thirty days from the date when the transcript from the justice of the peace was filed with the clerk of this court, nor does it show that the information was filed by leave of the court. (§ 2, page 249, Session Laws of 1891.) Complaint does not allege that defendant Smith, without excuse, made default of appearance, etc. (§ 256, page 451, Compiled Statutes; § 2400 of the Penal Code.) The complaint alleges, that the judge, instead of the court, declared the bond forfeited. (§ 256, page 451, Com-

piled Statutes; § 2400, Penal Code.) Complaint does not allege that the crime charged in the information was the same crime for which the defendant was held to answer by the justice of the peace. (*People v. Hunter*, 10 Cal. 503.) The complaint does not show that the bond was certified by the sheriff to the clerk of this court, and by him filed and recorded. (*Mendocino County v. Lamar*, 30 Cal. 628; *People v. Higgins*, 10 Wend. 462.)

C. B. Nolan, Attorney General, for the State.

The presumption is that the county attorney performed his duty and filed the information within the time required by law or obtained leave of court to file it. By section 3266, subdivision 15, of the Code of Civil Procedure, it is made a disputable presumption "that official duty has been regularly performed." In the *State v. Millsap*, 69 Mo. 358, it was held that "the cognizor in a bond conditioned for his appearance at the next term of the circuit court to answer an indictment, then to be preferred, and not to depart the court without leave, forfeits his bond if he fails to appear although no indictment is found against him." (*State v. Stout*, 11 N. J. Law, 147, 158; *Pack v. State*, 23 Ark. 235; *State v. Cooke*, 37 Tex. 155; *State v. Kyle*, 99 Ala. 256; *Commonwealth v. Treever* (Mass.) 9 N. E. 524.) Even if the information was not filed in time it was good unless the defendant made a motion to quash on that ground. (*State v. McCaffrey*, 16 Mont. 33.) And the defendant could not decide that question for himself but must apply to the court. (*State v. Stout*, *supra*, 2d Am. & Eng. Ency. of Law, page 34, see note; *State v. Cooke*, *supra*.) If the information that was filed against the defendant had been quashed, the defendant would have under the condition of the bond to answer any subsequent information that might have been filed against him. (*State v. Hancock* (N. J.) 24 Atl. 726; 3 Enc. Pl. & Pr., page 249, note 1.) It is not necessary to allege, or that the minutes should show, that the defendant made default without excuse.

In *People v. Bennet* (N. Y.) 32 N. E. 1044, under a statutory provision similar to section 256 page 2151, Compiled Statutes and section 2400 of the Penal Code, the minutes of the court recited that the defendant not appearing and his surety not bringing him forth, on motion of district attorney recognizance forfeited and judgment entered. It was not contended it was necessary to show that the principal made default without excuse. It is also contended that the judge instead of the court declared the bond forfeited. The statute does not require the court to declare a forfeiture of the bond. Section 2400 of the Penal Code and section 256, page 451 of the Compiled Statutes provides that upon the entry of the fact of the defendant's neglect to appear upon the minutes of the court, the undertaking of bail is forfeited. (*People v. Van Eps*, 4 Wend. 393.) And is a sufficient allegation of breach. (*People v. Huggins*, 10 Wend. 465, 472; 2 Chitty on Pleading, 230.) In an action of debt at common law, breach stated according to the terms of the recognizance is sufficient. (*State v. M'Quire*, 42 Minn. 27, 29.) An averment that the defendant did not appear and answer and abide the judgment, etc., is sufficient on general demurrer. (*State v. Inman*, 7 Black. (Ind.) 225.) The same crime is charged in the information that is charged in the recognizance to wit: grand larceny. But it is not necessary that defendant should be charged in the information with the same crime as that for which he is held in recognizance, where he is bound to appear and not depart without leave of court, defendant in such case must answer any information filed against him although the crime charged is different from that mentioned in the recognizance. (*Commonwealth v. Trevers* (Mass.) 9 N. E. 524; 2 Am. & Eng. Ency. of Law, page 30, note 6 and page 34.) A description of offense by its name is sufficient. (*State v. Birchim*, 9 Nev. 95; *Jennings v. State*, 13 Kan. 80, 90.) An action upon recognizance cannot be defeated by neglect of the clerk to endorse or record it, it may be recorded after execution is awarded. (§ 258, page 451 of the Compiled Statutes.) The code does not require the bond to be filed or recorded. In

Jennings v. State, 13 Kan. 80, 91, it was held that the omission to file and record a recognizance as required by the code of Kansas, did not invalidate it. (*State v. West et al.*, 3 Ohio St. 509, 516.) In *Latterson v. State*, 12 Ind. 86, it was held that an action could be maintained on a recognizance, as on any other contract, without being filed with the clerk of the circuit court. Same ruling in *Adams v. State*; 48 Ind. 212 overruling *Urton v. State*, 37 Ind. 339.

PEMBERTON, C. J.—Counsel for appellants contends that the complaint does not show that the information presented in the district court against Smith charged him with the commission of a public offense. The allegation in the complaint in this respect is that the county attorney filed in the “District Court of the Sixth Judicial District of the State of Montana, in and for the county of Carbon, an information charging the said Joseph Smith with the crime of grand larceny, committed within the county of Carbon and State of Montana on or about the 15th day of May, A. D. 1895, by unlawfully taking one cow, the property of, and from the possession of, H. C. Lovell.” From this it will be seen that the complaint alleges that the information charged Smith with the crime of grand larceny. The condition of the bond is as follows: “Now, therefore, if the said Joseph Smith shall be and appear at the next ensuing term of said court, on the first day thereof, and from day to day, and from term to term, and not depart therefrom without the order of said court, and if convicted of said crime, will render himself in execution thereof, then this obligation shall be void, otherwise to remain in full force and effect.” The complaint charges that the crime of grand larceny was committed by Smith, by his “unlawfully taking one cow,” etc. But we think that part of the complaint alleging how he committed the crime charged in the information was unnecessary. It was surplusage. Omit this part of the allegation, and the complaint alleges that the information charged Smith with grand larceny;—the charge mentioned in the bond as the one on which he was to appear at the district court and answer.

Counsel for appellants says the complaint is bad because it does not allege that Smith, "without excuse," made default of appearance. The complaint alleges that Smith "was duly called at the proper time and place, and failed to appear in person." This charges a failure on the part of Smith to comply with the condition of his bond, and is a sufficient allegation, we think, to authorize a forfeiture, under section 256, Criminal Practice Act (Compiled Statutes 1887, page 451). (*People v. Bennett* (N. Y. App.) 32 N. E. 1044.) If Smith had a sufficient excuse for not appearing, he ought to have shown it on a motion to set aside the forfeiture.

Counsel for appellants contends that the complaint is bad because it alleges that the judge, instead of the court, declared the bond forfeited. We think that the averment in the complaint that Smith was called and failed to appear in the district court was "equivalent to an averment that his default for not appearing was entered of record." *People v. Higgins*, 10 Wend. 465, and cases cited. This, we think, was all that it was necessary to aver in this respect. This was all that was necessary to aver under section 258, Criminal Practice Act (Compiled Statutes 1887, page 451).

The counsel for appellants also contends that the complaint does not allege that the crime charged in the information was the same crime for which Smith was held to answer. Smith was held to answer for the crime of grand larceny. The complaint alleges that he was charged by the information with the crime of grand larceny, as we have seen above. It certainly does not appear by the complaint that the crime for which he was held to answer and the one charged in the information are not the same, but, on the contrary, it does fairly appear that the crimes alleged in the information and bond are the same.

Counsel for appellants further contends that the complaint does not allege that the bond was certified by the sheriff, who took it, to the clerk, and "filed and recorded by him." This, we think, did not invalidate the bond, or relieve the sureties from their liability thereon. See Criminal Practice Act, § 258 (Compiled Statutes 1887, page 451).

We think the errors assigned are purely technical, and without substantial merit. The judgment appealed from is affirmed.

Affirmed.

HUNT and BUCK, JJ., concur.

M'CARTHY, RESPONDENT, v. O'MARR, SHERIFF,
APPELLANT.

[Submitted February 8, 1897. Decided February 15, 1897.]

Sheriff—Liability to Plaintiff on Sale of Property of Third Person.

Under an execution against the property of "L," a sheriff sold personal property in her possession, but belonging to a third person, and which had been attached in the action; after the sale the sheriff learned that "L" did not own the property, and he then returned the money to the purchaser and the property to its owner, and made his return upon the execution in accordance with the facts. *Held*, that the sheriff was not liable to the judgment creditor for the amount realized at the sale.

Appeal from District Court, Meagher County. F. K. Armstrong, Judge.

ACTION by Tim McCarthy against James J. O'Marr. Judgment for plaintiff. Defendant appeals. Reversed.

Statement of the case by the justice delivering the opinion.

Assumpsit for money had and received. The complaint alleges that on May 22, 1893, the plaintiff, McCarthy, recovered a judgment before a justice of the peace against Emma Lyons for \$40 and costs, and that on the same day execution was duly issued and delivered to the sheriff pursuant to law; that thereafter the defendant O'Marr, as sheriff, levied upon a piano as the property of Emma Lyons, and on June 9, 1893, sold the same to one Kidd for \$143, but that defendant has neglected to pay the amount of the judgment to the plaintiff. The execution in the case of *McCarthy v. Lyons* contains the

usual and formal recitals, commanding the sheriff to make the sums due on the judgment in the suit of *McCarthy v. Lyons* out of the personal property of the debtor, and make return within 30 days after the receipt of the execution. The sheriff's return recited that he levied in due form upon a piano then in the possession of defendant's agent, in his county, and that on June 6, 1893, he sold the piano, and realized sufficient to pay the execution, with fees of levy and sale, "and thereupon I returned the money to the purchaser, as the property did not belong to the defendant." The sheriff's answer to the complaint was that, at the time the execution was issued and placed in his hands for service, the defendant had no property in his county, and had had no property therein since said execution, and that the piano mentioned in the complaint never was the property of the defendant named in the execution; that as sheriff, under the order and direction of the plaintiff, McCarthy, he levied upon and sold the piano under the execution, but that at the time of the levy and sale he had no knowledge that the piano did not belong to Emma Lyons, and that, immediately upon ascertaining that the same was not the property of said Emma Lyons, he notified the plaintiff to give him an indemnity bond to protect him on account of the sale of the piano, but that plaintiff did not ever or at all tender him any indemnity bond, and, long after five days had elapsed after the demand for the indemnity bond, he, the sheriff defendant, turned the property over to the owner; that, since the return on the execution referred to in plaintiff's complaint, the defendant, with leave of the court, made and filed an amended return on said execution, which was as follows: "County of Meagher—ss.: Office of the sheriff. Leave of court having been first obtained, I hereby make my amended return on the within execution, and certify that I received the within execution on the 26th day of May, 1893, and that I found no property, either real or personal, belonging to the defendant, in the said county of Meagher, out of which I could make the amount or the within execution, or any part thereof. James O'Marr, sheriff of Meagher County. Dated

this 6th day of February, 1894." Defendant denied all damage by any act of his, and says that he has withheld no money collected under said execution from the sale of any property that belonged to the defendant named in the execution. The replication denied that the piano levied on and sold was not the property of Emma Lyons; and, among other things, plaintiff denied that the defendant sheriff ever made or filed an amended return to the execution, or that he ever obtained leave of the court so to do, or that any return ever had been made by the sheriff, except the one set out in the complaint. The case was originally tried before Hon. Frank Henry, as judge, and was taken under advisement by him. Thereafter, and before Judge Henry rendered his decision, it appears that, to avoid the expense of another trial, the testimony as taken before Judge Henry was submitted to Hon. Frank Armstrong, with the agreement by all parties that Judge Armstrong might decide the case as if it had originally been tried before him. Judge Armstrong found from the pleadings and testimony that the judgment was duly rendered in the justice's court for Townsend town-ship, of Meagher county, Mont., in favor of McCarthy and against Emma Lyons, and that in said case, and prior to the judgment, there had been an attachment issued and levied upon a piano in the possession of the agent of defendant in that suit, Emma Lyons; that the sheriff sold the piano under the execution, and that about the time of the sale he returned the money to the purchaser, and released the property to the Capital City Music Company, and that in turning over the property levied upon under the execution to the said Capital City Music Company, and returning the money to the purchaser, he acted wholly without the advice or consent of plaintiff, and that the justice of the peace had never granted the sheriff leave to amend his return upon the execution; and that, as a matter of fact, the sheriff had never filed any amended return with the justice. As a conclusion of law from these findings, Judge Armstrong decided that the sheriff's act in turning the piano over to the Capital City Music Company, and the money to the purchaser, was unwarranted, and

did not release him from his obligation to pay over to the plaintiff, and also that, as sheriff, defendant would have no authority to amend his return, and that, therefore, the plaintiff should recover. Judgment was entered for plaintiff. The defendant requested the court to find that the piano was seized by the sheriff at the request and by the order of plaintiff in the suit of *McCarthy v. Lyons*, and that the piano was at no time the property of Emma Lyons, but was always the property of the Capital City Music Company, and that defendant did not know that the piano was not the property of Emma Lyons until after the sale of the same by him as sheriff. The memorandum attached to the defendant's request, and subscribed by Judge Armstrong, is as follows: " * * * The foregoing facts were established by the proof as admitted by the court at the trial, but, in my opinion, was erroneously admitted, and for this reason I did not consider the same in making up my findings in the case; but, in order to allow the defendant to present the record fully, I hereby annex these findings at his request." The appeal is from the judgment in favor of plaintiff and against defendant.

Smith & Gormley, for Appellant.

Fletcher Maddox, for Respondent.

HUNT, J.—It is clear, by Judge Armstrong's memorandum attached to defendant's request for findings, that the proof on the trial of the case was to the effect that the plaintiff in the suit of *McCarthy v. Lyons* directed the defendant herein, as sheriff, to levy upon the piano as the property of Emma Lyons, and that the sheriff did so, and sold the same, without any knowledge of the admitted fact that Emma Lyons had no interest whatever in the property so levied upon and sold. It was also proved that after the sale, and before his return of the execution, the sheriff first found out that Emma Lyons was not the owner of the piano, and that thereupon he delivered the same to the Capital City Music Company, the real owner, and returned the money he had collected on the sale to

the purchaser thereof. Upon these proofs, we do not understand that the learned judges who presided in turn during the various stages of the trial of the case disagree. The record and its recitals, by Judge Armstrong, that the proofs were as defendant requested the court to find, justify this statement. But we do understand that they are much at variance with one another both as to legal competency of such proofs, and as to the legal effect to be given them if competent. It appears to us that the wrong complained of by plaintiff (respondent) is the failure of the sheriff to turn over to plaintiff a sufficient amount of money realized from the sale of the piano to satisfy the execution issued in the case of *McCarthy v. Lyons*; and we are satisfied that, under the answer of defendant, he could prove that the piano was not the property Emma Lyons when attached, nor ever after, and that such proof would be competent evidence that defendant is in no default, but would have been guilty of conversion had he complied with plaintiff's wishes and paid him the money. We therefore think the evidence of defendant upon this branch of the case was properly admitted on the trial, but improperly disregarded in the findings adopted. It is well established that an officer is under no duty—indeed, he has no right—to execute a process delivered to him for service by seizure of the property of a person against whom the process does not run. (*Gallup v. Robinson*, 11 Gray 20.) Furthermore, if a sheriff fails or omits to levy an execution upon goods which did not at the time of the attachment, or afterwards, belong to the debtor, though they had been attached as the property of the debtor, he will not be guilty of any negligence or misconduct at law, and the creditor has no cause of action therefor. And in such an instance it is a good defense, where the officer is sued, to prove paramount title in another. (*Canada v. Southwick*, 16 Pick. 556; *Governor v. Gibson*, 14 Ala. 326.) This doctrine is reasonable, for, if the judgment debtor in truth has no personal property within the county of the sheriff, why should that officer, assuming he has acted in good faith, be required to pay the judgment of the attaching creditor? (*Lummis v. Kasson*,

43 Barb. 373.) The statute (section 320, div. 1, Compiled Statutes 1887), as if to protect a sheriff against liability in trespass for levying upon the personal property of a third party, if such a party claims the property seized, makes it obligatory upon that official to deliver the property levied upon to the claimant, after notice, unless the plaintiff gives him a good bond to indemnify him against loss or damage by reason of holding such property. And if he must turn over property levied upon, when claimed on oath by a third person, unless indemnified, on what principle should he be compelled to apply the proceeds of the sale of the property of a third person towards payment of the debt of the creditor, where he, in all good faith, has only ascertained after such sale that the property has always belonged to a third person, and never did to the judgment debtor? The learned judge who made the findings and conclusions of law in the case upon which judgment was predicated doubtless recognized these principles above stated, but believed that they were inapplicable to the facts, because the sheriff, having made a return of a levy and sale of the piano as the property of Emma Lyons, was estopped from afterwards saying that it was not her property, and hence his payment of the proceeds to the purchaser, and his return of the piano to the Capital City Music Company, were unauthorized by law, and did not release him from his obligation to pay the amount of the plaintiff's judgment to him. The judge was also of the opinion that the sheriff had no authority "to amend his return as attempted by him to be done, as it would have been amending such return so as to state the facts different from what they really were; and, as a legal proposition, an officer can only amend his return so as to make the return correctly set forth what was actually done, and not to change the attitude or status of the parties." But, if we concede that the officer could not make the amended return he did, because it contradicted the fact of a levy and sale, —a proposition which we need only concede for the purposes of this opinion, —we nevertheless believe that his defense of paramount title was admissible notwithstanding the first re-

turn he made. By it the sheriff recited the actual facts of his levy and sale, and of his subsequent return of the money to the purchaser because the piano did not belong to the defendant named in the execution. There is nothing inconsistent with this return and the fact proved, that the knowledge that Emma Lyons did not own the piano only came to him after the execution sale. So that his attitude upon the trial and as disclosed by his return are not in conflict with one another; and the return, so far as it goes, conforms to the proof. The case is thus brought within the rule laid down in *Hopkins v. Chandler*, 17 N. J. Law, 299, that a sheriff is not, by levy and sale, estopped from denying the plaintiff's right to the proceeds of the sale, nor from showing that the property sold under the plaintiff's execution was not the defendant's, nor liable to such levy and sale. We quote the following pertinent language from the opinion of Chief Justice Hornblower in that case: "It comes then to this question: Can a sheriff, after levying upon property and selling it under an execution, withhold the money from the plaintiff, and successfully resist an amercement for not paying it over, upon the ground that the property levied upon and sold by him belonged to other persons than the defendant, and were not liable to the plaintiff's execution? An amercement comes in the place of an action at law for money had and received, and if, in such an action, the facts stated in the case were clearly proved or admitted, we should have no difficulty, perhaps, in saying the plaintiffs ought not to recover. It would seem to be unreasonable, if a sheriff by mistake should sell property not liable to a plaintiff's execution, that he should be compelled to pay the money to the plaintiff, and be left to respond to the owner of the property. And, upon this view of the subject, there would seem to be no good reason why, in a plain case, such as this strikes me to be, we should not, upon a motion for amercement, make a similar decision. * * * The first question, then, is whether the sheriff is estopped by his levy and sale from denying the plaintiff's right to this money? I think not. In an action against him, he would be at liberty to

show that the property was subject to prior liens which had exhausted the proceeds; and I can see no reason why he might not be permitted to show that he levied and sold by mistake, under the plaintiff's execution, property that was not liable to such seizure and sale." (See, also, *Harris v. Kirkpatrick*, 35 N. J. Law, 392; Crock. on Sheriff, § 853; *Commonwealth v. Booker*, 6 Dana 443; Freeman on Executions, § 304.) It may be that a sheriff cannot, by averments of his pleading, impugn the verity of his official return; yet he is often allowed to prove other facts consistent with it, but tending to exonerate him from a liability apparently created by it. (Murfree on Sheriffs, § 868.) But, as explained, this is not a case where a sheriff seeks to falsify his return on an execution by evidence, but rather one where he has made a special return of facts, and by his evidence fully explains those facts; and this, as against the judgment creditor suing, we think he may do, either in action for money had and received, or for a false return. *Lummis v. Kasson*, 43 Barb. 373; *Fuller v. Holden*, 4 Mass. 498; *Canada v. Southwick*, *supra*; *Shotwell v. Hamblin*, 23 Miss. 157; *Bank v. Benham*, 23 Ala. 143; *Evans v. Davis*, 3 B. Mon. 344; *Baker v. M' Duffie*, 23 Wend. 289; Alderson on Judicial Writs, page 578; Freeman on Executions, § 366; *Decker v. Armstrong*, 87 Mo. 316.

In conclusion, we find appellant's defense is well supported by reason and authority. The judgment is therefore reversed, and the cause remanded, with direction to enter a judgment for the defendant.

Reversed.

PEMBERTON, C. J., and BUCK, J., concur.

KNIGHT ET AL., RESPONDENTS, v. LE BEAU, APPELLANT.

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[Submitted February 8, 1897. Decided February 15, 1897.]

Action by Administrator — Pleading — Appointment — Demurrer, Grounds of — Practice.

Under section 745, Code of Civil Procedure 1895, it is not necessary to state in a complaint by an administrator the facts showing jurisdiction of the court to grant letters; it is sufficient to state that letters were duly given and made; the better practice, however, is to state the facts.

DEMURRER—Stating Grounds.—That the plaintiff has no legal capacity to sue, is a separate ground of demurrer, distinct from the grounds of "facts insufficient to constitute a cause of action" and from the ground of "uncertainty," cannot be considered unless specified in the demurrer.

SAME.—Unless it appears upon the face of the complaint that the court has no jurisdiction of the subject matter, a demurrer will not be sustained on that ground.

SAME.—A complaint in an action by an administrator is not subject to a demurrer on the ground that it is unintelligible and uncertain because it does not state the date of the death of deceased.

Appeal from District Court, Gallatin County. F. K. Armstrong, Judge.

ACTION by J. A. Knight and another, as administrators with the will annexed of the estate of George Henry Godwin, deceased, against Peter Le Beau. From a judgment for plaintiffs on the pleadings, defendant appeals. Affirmed.

Statement of the case by the justice delivering the opinion.

The plaintiffs' complaint in this action is as follows: "The plaintiffs complain of the defendant, and allege: First. That on the 25th day of November 1895, the plaintiffs were duly and legally appointed administrators with the will annexed of the estate of George H. Godwin, deceased, and that on the 12th day of December, 1895, they duly qualified as such administrators, and letters of administration with the will annexed of said estate, were duly and legally issued to them and each of them; and that they and each of them have ever since been, and now are, the duly and legally appointed, qualified, and acting administrators with the will annexed of the estate

of George Henry Godwin, deceased. Second. That on the 2d day of January, 1893, at Park Ranch, Cherry Creek, Madison county, Montana, the defendant made, executed, and delivered to the said George Henry Godwin his promissory note in writing, bearing date on that day, which promissory note reads in words and figures following, to-wit: '\$500. Park Ranch, Cherry Creek, Madison Co., Montana, January 2d, 1893. One day after date I promise to pay Geo. H. Godwin or order, for value received, five hundred dollars, with interest at ten per cent. per annum both before and after maturity. January 2d, 1893. P. Le Beau.' Third. That, at the time of the appointment of plaintiffs as administrators with the will annexed of said estate as aforesaid, said note was a part of the assets of said estate, and the property thereof, and the same came into the hands of these plaintiffs, as administrators aforesaid, as the property of said estate; and plaintiffs have ever since been, and now are, the lawful owners and holders of said promissory note. Fourth. That the defendant has not paid said note, or any part thereof, or any interest thereon, but that the principal sum mentioned in said note, with interest thereon at the rate of ten per cent. per annum from the 2d day of January, 1893, is now wholly due and unpaid, and justly owing from defendant to plaintiffs, as administrators aforesaid. Wherefore plaintiffs pray for judgment against the defendant for the sum of \$500, with interest at the rate of 10 per cent. per annum from the 2d day of January, 1893, together with all costs of this action, and for all other proper relief." To this complaint the following demurrer was filed: "Comes now the defendant in the above entitled action, and demurs to the complaint therein on the following grounds: First. The complaint does not state facts sufficient to constitute a cause of action. Second. The court has no jurisdiction of the subject of the action. Third. The said complaint is unintelligible and uncertain in the following particulars: (1) It cannot be ascertained from said complaint when or where said George H. Godwin died. (2) It cannot be ascertained from said complaint when or by what means

said cause of action accrued to plaintiffs, if ever." The demurrer was overruled, and, the defendant declining to answer, judgment was rendered in favor of plaintiffs as prayed for. The appeal is from the judgment.

Luce & Luce, for Appellant.

Hartman Bros. & Stewart, for Respondents.

BUCK, J.—We have before us in this appeal able and elaborate briefs on interesting questions of pleading, and have given the arguments of respective counsel the most careful consideration. Does the complaint state a cause of action? We think it does. It is true that the averments as to the legal capacity of plaintiffs to sue are very defective. Properly the pleading should have shown by direct averment that Godwin died leaving a will; that a court of this state (naming it) duly made orders admitting said will to probate, and issuing letters of administration with the will annexed to plaintiffs. See 1 Estee, Pl. & Prac. § 419. Section 745, Code of Civil Procedure 1895, is as follows: "In pleading a judgment, or other determination of a court, officer or board, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading must establish on the trial the facts conferring jurisdiction." Under the old common-law rule, in pleading an order of an inferior court, the jurisdictional facts preceding it had to be set forth. Section 745, *supra*, has changed the old rule, but certainly was not designed to countenance the careless omissions we have mentioned. We strenuously condemn such laxity in pleading. See *Halleck v. Mixer*, 16 Cal. 574; *Bird v. Cotton*, 57 Mo. 568. One of the specific grounds for demurrer designated in section 680 of our Code of Civil Procedure of 1895 is "that the plaintiff has not the legal capacity to sue." Of course, under said last-named section, a demurrer on this ground lies only when the legal incapacity appears on the face of the complaint. See *Herbst Importing Co. v. Hogan*, 16 Mont. 384,

41 Pac. 135. But a demurrer on the ground of want of legal capacity is something entirely distinct from one which raises the objection that a complaint does not state facts sufficient to constitute a cause of action. When one of these two separate grounds is the basis of a demurrer, the other cannot be considered. See Pom. Rem. (2d Ed.) § 208; *Fulton Insurance Co. v. Baldwin*, 37 N. Y. 648; *Phoenix Bank v. Donnell*, 40 N. Y. 410; *Debolt v. Carter*, 31 Ind. 355; *Cone Ex. & Commission Co. v. Poole*, 24 L. R. A. 289, 19 S. E. 203; *Mora v. Le Roy*, 58 Cal. 8; *Phillips v. Goldtree*, 74 Cal. 151, 13 Pac. 313, and 15 Pac. 451; *Miller v. Luco*, 80 Cal. 257, 22 Pac. 195; *Halleck v. Mixer*, 16 Cal. 574; and *Bird v. Cotton*, 57 Mo. 568.

The actual cause of action in the complaint under review is the unpaid promissory note executed by defendant to the decedent, Godwin. The capacity in which a plaintiff sues is not necessarily an essential element of the cause of action stated in his complaint. See authorities last cited. In *State v. Matson*, 38 Mo. 489, and *Judah v. Fredericks*, 57 Cal. 389, which are the main precedents relied upon by appellant, the courts evidently proceeded upon the theory that the right of the party to recover is an essential element of the cause of action he states. We can readily understand that the right to recover may be regarded as an element of the cause of action, under certain circumstances. For example, if it appears on the face of the complaint that the plaintiff is in no wise connected with the cause of action, and has clearly no right to recover on it, a general demurrer would lie. (See *Berkshire v. Shultz*, 25 Ind. 523.) But there is a manifest distinction between a complaint which fails to show any capacity to sue, or any right to recover, and one which only defectively sets forth the capacity or right. In the two cases relied upon by appellant, cited *supra*, we think the courts overlooked this distinction. For in both of these cases there were allegations showing that the plaintiffs sued as executors of decedents, however defective they may have been. Between a right to recover and the want of legal capacity designated as a ground for demurrer in section 680, Code of Civil Procedure 1895,

the difference may not, at times, seem very clear. But if a right to recover is to be regarded as an essential element of the cause of action stated, to such an extent as to include the capacity to sue, then such a doctrine, carried out logically, would completely nullify the specific statutory ground of demurrer for want of legal capacity to sue. We cannot follow any such doctrine, even if the cases of *State v. Matson* and *Judah v. Fredericks*, *supra*, and others cited by appellant, do follow and teach it. For the purposes of the general demurrer to the complaint because it fails to state a cause of action, we must accept as conceded that the plaintiffs were the administrators of Godwin, that Godwin was dead, and that the note sued upon is in their hands as administrators of his estate. However defective the allegations, these facts are clearly inferable. Under the general rule that there is no presumption against the pleader, we cannot infer from these averments that Godwin is alive, that he left no will, and that a court qualified to do so did not duly issue letters of administration with his will annexed to plaintiffs. Appellant has cited the case of *Harmon v. Cattle Co.*, 9 Mont. 243, 23 Pac. 470, and *Weaver v. English*, 11 Mont. 84, 27 Pac. 396. We do not think these cases apply in the present appeal. In the former a judgment of an inferior court was relied upon as a cause of action, and the court held that the said judgment was not properly pleaded in the complaint. In the latter, the judgment of the inferior court was relied upon as the gist of a defense, and the court held also that it was not properly pleaded.

Another ground of demurrer relied upon by appellant is that the court had no jurisdiction of the subject-matter of the action. Lack of jurisdiction does not appear on the face of the complaint.

Again, appellant urges that the complaint is unintelligible and uncertain, inasmuch as it cannot be ascertained when or where said Godwin died. But appellant is not injured by such omissions in the complaint. The demurrer was properly overruled in this respect.

Again, appellant urges that the complaint is unintelligible

and uncertain because it cannot be ascertained therefrom when or by what means a cause of action accrued to the plaintiffs, if it ever did accrue. The answer to this ground of demurrer is contained in the reasons we have set forth in treating the first ground, namely, that the complaint does not state facts sufficient to constitute a cause of action. If the defendant had wished to test the right or capacity of plaintiffs to sue on the note to Godwin, he should have filed an answer. For these reasons the judgment is affirmed.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

SKLOWER, RESPONDENT, v. ABBOTT, APPELLANT.

[Submitted February 8, 1897. Decided February 15, 1897.]

Judgment—When a Lien—Action to Quiet Title—Answer.

- 1st. Under Section 307, Code Civil Procedure, Compiled Statutes 1887, a judgment is not a lien upon the real estate of judgment debtor, until it is entered on the judgment docket.
- 2nd. The lien of an attachment upon real estate is prior to the lien of a judgment obtained prior thereto, but not docketed until after the levy of the attachment.
- 3rd.—*Action to Quiet Title—Possession by Plaintiff.*—In an action to quiet title, plaintiff must allege and prove possession of the premises.

Appeal from District Court, Meagher County. Frank Henry, Judge.

ACTION by Max Sklower against C. P. Abbott to quiet title. From a judgment in favor of plaintiff on refusal of defendant to amend after a demurrer to the answer was sustained, defendant appeals. Reversed.

Statement of the case by the justice delivering the opinion.

This was an action to quiet title to real estate situated in Meagher county. From the complaint and answer on file, the facts presented for the court's consideration are as

19	228
26	236
19	238
27	313
19	228
30	16

follows: A judgment was duly obtained by a creditor of the original owner of the land on September 28, 1892, but was not docketed by the clerk of the court until October 4, 1892. Appellant (defendant below) bases his title upon this judgment. On October 3, 1892, respondent (plaintiff below), as a creditor, instituted a suit against the owner of the land, and caused an attachment to be levied thereon. The complaint also alleges that, at the time of the levy of the attachment, respondent, as well as the members of the firm of attorneys representing him (this firm having also represented the first creditor in obtaining judgment against the original owner), was fully aware of the existence of the undocketed judgment, and levied the attachment to destroy its value, and to cheat and defraud appellant. The answer to the complaint raised a direct issue as to who was in the actual possession of the premises. A demurrer was filed on the ground that said answer contained no defense. It was sustained. Appellant refusing to amend, judgment was rendered in favor of plaintiff. The appeal is from the judgment.

Smith & Gormley, for Appellant.

Max Waterman, for Respondent.

BUCK, J.—The first question to be determined is whether the judgment relied upon by appellant was a lien upon the real estate in controversy before it was docketed. The question must be determined by the statute in force at the time. This statute (section 307, Code of Civil Procedure, Division 1, Compiled Statutes 1887) is as follows: "Immediately after filing a judgment roll the clerk shall make the proper entries of the judgment, under appropriate heads, in the docket kept by him; and from the time the judgment is docketed it shall become a lien upon the real estate of the judgment debtor, not exempt from execution, in the county, owned by him at the time, or which he may afterward acquire, until said lien expires. The lien shall continue for six years, unless the judgment be previously satisfied." Under said section, it is manifest that this judgment did not become a lien upon the

real estate until after the creation of the attachment lien of respondent. The language of said section 307 admits of no other construction, but, as fortifying it, certain language in the case of *Creighton v. Hershfield*, 2 Mont., on page 390, is worthy of citation. In that case the supreme court of Montana, by Mr. Justice Knowles, in referring to a statute (§ 295, Codified Statutes 1871-72; § 358, Code of Civil Procedure; Division 1, Compiled Statutes 1887) requiring a deficiency judgment in a mortgage foreclosure to be docketed in order to constitute it a lien on real estate, said in substance: "The object of having a clerk docket a judgment for a deficiency is that the said judgment may become a lien on real estate, and is also to apprise purchasers of such estate of the amount of the lien thereon." If appellant was damaged by any act of the clerk of the court in failing to docket the judgment, or by any negligence or deceit practiced by the attorneys in reference to such docketing, he should seek redress from them. The allegations of the answer in this respect are wholly insufficient to warrant any redress as to respondent. If he was not a party to any fraud or conspiracy entered into for the purpose of delaying the docketing of the judgment,—if there was any such fraud or conspiracy,—he had a perfect right to have his attachment levied before any such docketing.

In one respect, however, the lower court committed error. The possession of respondent at the time of bringing the suit was directly at issue. If he was not in possession at such time, his title should be determined in an action of ejectment, and, in order to maintain this action to quiet title, he must not only allege, but prove, possession on his part. (See *Wolverton v. Nichols*, 5 Mont. 89, 2 Pac. 308; *Milligan v. Savery*, 6 Mont. 129, 9 Pac. 894.) For the last reason only the judgment of the lower court must be reversed. The cause is remanded, with directions to the lower court to overrule the demurrer and hear testimony on the question of possession.

Reversed.

PEMBERTON, C. J., and HUNT, J., concur.

REARDON, APPELLANT, v. PATTERSON ET AL.,
RESPONDENTS.

[Submitted January 25, 1897. Decided February 15, 1897.]

19	231
29	159
19	231
31	30
31	95
31	96

*Pledgee—Sale by—Action for Conversion of Collateral—
When can be Brought—New Trial—Evidence—Immaterial
Error.*

A pledgee of personal property who holds it as a security for the performance of a contract by the pledgor and who sells it for its full value without notice to him, and applies it in payment of the damages ascertained to be due for such non-performance, is not liable to the pledgor for the full value of the pledge.

SAME.—Before the pledgor can sue for the conversion, he must show that he was entitled to the possession, either by proving performance of the contract for which it was pledged as security or payment of the damages for non-performance.

NEW TRIAL.—Where the evidence is conflicting, the findings of facts by the court will not be disturbed by the appellate court.

EVIDENCE.—A witness for plaintiff testified that one of defendant's witnesses said to him "do you want to make three dollars; there is a subpoena, and there is three dollars in it; go and see Murray's (defendant's) lawyer, and get subpoenaed and there is three dollars in it." Held, that the testimony was immaterial and was properly stricken out.

SAME.—Immaterial error.—Where the testimony of a witness is stricken out, and then is subsequently admitted, the error, if any, in striking out the testimony is immaterial.

Appeal from District Court, Silver Bow County. J. J. McHatton, Judge.

ACTION by Timothy Reardon against H. M. Patterson and T. J. Murray for the conversion of a school warrant. Judgment for defendants, and plaintiff appeals. Affirmed.

Statement of the case by the justice delivering the opinion.

This action was for the recovery of a school warrant originally issued to appellant (plaintiff below). The judgment in it was rendered before the Codes of 1895 went into effect. The complaint alleges a conversion of the warrant by defendants. The answer denies any conversion, and sets forth affirmatively that in July, 1893, the plaintiff, Reardon, and his partner, entered into a contract with the defendant Murray, to plaster the interior of a building belonging to Murray,

under the supervision of the defendant Patterson, who was an architect in charge of the work; that the said warrant was delivered to the said Patterson, to be held by him for Murray in lieu of a bond required of Reardon and his partner under the terms of said contract; that Reardon and his partner failed to perform their covenants in said contract, to the damage of defendant Murray in the sum of \$960; and that thereupon Murray sold the warrant for its value, alleged in the complaint to be \$483.30, and applied the proceeds on the damages he had sustained. The replication denies the delivery of the warrant for the purpose alleged, denies that it was deposited with Patterson in lieu of a bond, and denies any breach of contract on the part of Reardon and his partner, and sets forth that, at the time Patterson turned over the warrant to Murray, it was in Patterson's possession only as a bond and guaranty for the performance of a contract for plastering in the Lynch building which Reardon and his partner had with the firm of White & Demars. It also sets forth that Murray is still indebted to Reardon and his partner for plastering, under the terms of the Murray contract, in the sum of \$276.33, and that a suit on a lien filed by them on Murray's building is still pending in court. The evidence shows that, at the time the Murray contract was entered into, this warrant was in the possession of Patterson, to secure the performance of the White & Demars contract. Reardon testifies: "Along about the 1st of July, we entered into a contract with Murray to plaster his building. The question of a bond came up, and I said to Patterson: 'Of course, we will be through with the Lynch job long before the Murray job will be started, and that warrant can go as a bond on the Murray job.' Patterson said that was all right. * * * There was a delay, and we got through with the Murray job long before the Lynch job, probably a month or more after that." The testimony of Reardon's partner is substantially the same as Reardon's in respect to this agreement as to the warrant. Patterson's testimony is to the same effect. The evidence also shows that Reardon and his partner had had a settlement with White & Demars prior to the disposal of the

warrant by Murray, and that White & Demars make no claim to the warrant. The evidence as to whether or not Reardon and his partner complied with the terms of their contract for plastering the Murray building is conflicting. The court found for the respondents (defendants below). This appeal is simply from the order of the court denying appellant's motion for a new trial.

John W. Cotter, for Appellant.

Corbett & Wellcome, for Respondents.

BUCK, J.—The main specifications of error are that the evidence is insufficient to justify the trial court in finding that there was a breach of contract on the part of Reardon and his partner, and that it is also insufficient to justify any finding that the school warrant was deposited with Patterson as a guaranty for the performance of the Murray contract. The evidence as to the breach of contract was conflicting, and, under the well-known rule applicable, we cannot disturb this finding. Nor was the evidence insufficient to justify the finding that there was a pledge of the warrant. Upon that portion of Reardon's testimony (quoted in the statement) alone, the lower court had a right to decide that the warrant was delivered in place of the bond required by the contract. It appears clearly enough that Patterson held the warrant primarily to secure the performance of the White & Demars contract. There is no conflict, however, between White & Demars and respondents in respect to it. All right of White & Demars being eliminated, Murray's right alone to the warrant is for our consideration.

But appellant insists that, even upon the assumption that Murray had a right to hold the warrant, he could not dispose of it without notice of sale or a demand for its redemption. Murray sold it for its full value,—\$483.30,—and has credited appellant in that sum upon the damages (in excess of it) which the trial court found he had sustained by reason of the breach of the contract on the part of Reardon and his partner. By

disposing of the warrant without giving Reardon an opportunity to redeem it, or any notice of sale, Murray was guilty of a conversion without doubt, and his liability for such a conversion doubtless would be the value of the warrant at the time of the conversion, with legal interest from that date. (See *Brunell v. Cook*, 13 Mont. 497, 34 Pac. 1015; *Gay v. Moss*, 34 Cal. 125; *Robinson v. Hurley*, 11 Ia. 410.) Still, do the rules of law as to a notice and demand invoked by appellant avail him under the facts of this case? He has received the benefit of what he might recover even if he could maintain his present action. Murray has credited him with the full value of the warrant. The reason for these rules as to notice and opportunity for redemption are not applicable. These rules are intended to protect the pledgor from a sacrifice of a pledge. By mere conversion of a pledge, a pledgee does not necessarily annul the contract upon which it rests. (See *Jones on Pledges*, § 420.) A conversion by a pledgee does not *per se* absolve the pledgor from the payment of the debt he has secured. As a rule, before a pledgor can recover the property pledged, or its value, in an action for conversion, he must establish a right of possession. Without right of possession such a suit is not maintainable. (See *Laubenheimer v. Bach, Cory & Co.* (decided at this term) 19 Mont. 177, 47 Pac. 803.) And the right to the possession of the property which he has pledged follows from the extinguishment of the debt secured, or a sufficient tender of payment of such debt. A tender of what was due Murray was essential for the establishment of the right of plaintiff to recover in this action. (*Robinson v. Hurley*, 79 Am. Dec. 497, and note on page 506; *Hancock v. Insurance Co.*, 114 Mass. 155; *Jones on Pledges*, § 748.)

There are two more specifications of error to be disposed of. A witness for plaintiff, in reply to a question, testified as follows in reference to a conversation he had had with a witness for defendants: "The conversation was, he called me across the street, and said, 'Hello, Bill, do you want to make three dollars?' I said, 'How, Jack?' and he said, 'Well, there is

a subpoena; go and see Murray's lawyer, and get subpoenaed, and there is three dollars in it.''' The trial court, on the ground that this answer was immaterial, struck it out. The ruling was correct.

Another witness for plaintiff, in answer to a question as to a conversation he had with a witness for defendants, testified as follows: 'I had a conversation with John Gill within the last two weeks, on Main street. He came to me, and said, in the presence of Mr. Gallagher, 'You want to subpoena me for a witness there.' I said to Mr. Gill, 'I have not got anything to do with the case.' He said, 'Well, I will see Tim (Reardon). He don't have very much to say to me, and I don't like to ask him.' I said, 'I have not got anything to do with it, but I can tell him what you say.' He said, 'I will make a first-class witness for you. I know that Murray has had miners working around there, picking up big planks, and dropping them on the floors.''' This answer was also stricken out, on the ground that it was immaterial. This last ruling may have been erroneous, but soon afterwards the same witness was allowed to testify to substantially what was contained in the answer excluded. The error, if any, was cured. The order denying a motion for a new trial is affirmed.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

SANDERSON, RESPONDENT, v. BILLINGS WATER
POWER CO., APPELLANT.

[Submitted February 17, 1897. Decided February 23, 1897.]

Practice on Appeal—Ambiguity of Complaint—Instructions.

Where no demurrer to the complaint was filed, or where defendant answered after demurrer was overruled, a judgment will not be reversed because the complaint was ambiguous.

Under the former practice, instructions were not a part of the judgment roll, and could not be considered on an appeal from the judgment roll unless included in a bill of exceptions.

Appeal from District Court, Yellowstone County. George R. Milburn, Judge.

ACTION by Charles Sanderson against the Billings Water Power Company for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

Statement of the case by the justice delivering the opinion.

This was an action, brought by respondent (plaintiff below) against appellant (defendant below) for personal injuries. The pleadings were a complaint, answer and replication. A trial resulted in a verdict and judgment for plaintiff for \$2,500 damages. An appeal was taken from an order denying a motion for a new trial and the judgment. After the transcript was filed in this court, the respondent made a motion to strike out the statement on motion for a new trial therein, for the reason that the same was not prepared or served within the time required by law. This motion was granted, and the appeal from the order denying the motion for a new trial was at the same time dismissed. The present status of the case in this court is an appeal from the judgment alone. The complaint in the action is as follows: "That during all of the times hereinafter mentioned the defendant was, and still is, a corporation organized under the laws of the state of Montana.

That the defendant, on the 21st day of June, 1894, by its agents and servants, wrongfully, carelessly and negligently excavated a deep and dangerous excavation and trench in and across the public street, road, and highway known as 'Twenty-Seventh Street North,' between First avenue north and Second avenue north, in the city of Billings, Yellowstone county, state of Montana, and said defendant, by its agents and servants, wrongfully, negligently and carelessly, thus obstructing said highway, negligently left a large pile of earth in said road, street and highway, and negligently suffered said pile of earth dug from said excavation and trench to remain therein and thereon, obstructing said highway during the night time of said day; and to remain therein and thereon openly exposed, and without any protection, fence, light, signal, or anything else to indicate danger, or give notice to travelers or passers along said highway against accidents. That by reason of said negligence, carelessness, and improper conduct of the defendant by its said agents and servants, in the night time of the said day, while the plaintiff was lawfully traveling on said highway and street, the two-wheeled cart of the plaintiff therein being then and there driven by plaintiff with one horse drawing the same, then passing through said street and along and over said road, street and highway, the plaintiff being then and there wholly unaware of danger, was, without fault or negligence on plaintiff's part, accidentally driven against the said pile of earth, and was thereby overturned, whereof the plaintiff received great bodily injury. That one of his ankles was dislocated and badly sprained, and he is, as he is informed and believes, permanently injured. Plaintiff was made sick, sore and lame, was put to great pain, and was and is still prevented from going on with his occupation and business of farming; to his damage in the sum of five thousand dollars. Wherefore plaintiff demands judgment against the defendant for the sum of five thousand dollars and costs of this action."

O. F. Goddard, for Appellant.

Gib S. Lane, for Respondent.

BUCK, J.—Appellant insists that the complaint in this action does not state facts sufficient to constitute a cause of action, and hence does not support the judgment. His counsel suggests in support of this only ambiguities and uncertainties in the averments of the pleading. The record fails to disclose that a demurrer was interposed to the complaint on any ground whatsoever, and by answering appellant has waived the right to object to any such defects, if they exist. The complaint, in our opinion, states a cause of action.

We are also asked to examine certain instructions given by the lower court, which counsel for appellant claims are "inconsistent with, not justified by, and unsupported by the pleadings." At the time the judgment roll in this case was made up, which was before the codes of 1895 went into effect, the instructions in a case were not a part of the judgment roll, unless included in a bill of exceptions. See *Kleinschmidt v. McDermott*, 12 Mont. 315, 30 Pac. 393, and especially the concurring opinion written by Mr. Justice De Witt. (*Missoula Electric Light Co. v. Morgan*, 13 Mont. 394, 34 Pac. 488, and *State v. Black*, 15 Mont. 143, 38 Pac. 674.) The instructions in this case were never included in any bill of exceptions, and thereby made a part of the judgment roll. It is true they were set forth in the statement on motion for a new trial originally in the record, but they were there merely as a part of said statement. When this court struck out that statement, it also struck out of the record the instructions in the case, and therefore they are not before us for any consideration whatsoever. The judgment is affirmed.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

STATE EX REL. YOUNG, APPELLANT, v. YATES,
RESPONDENT.

[Submitted February 16, 1897. Decided February 23, 1897.]

Cities—Confirmation of Officers—Right of Mayor to Vote on a Tie.

CONFIRMATION.—The laws of Montana provide that "The corporate authority of cities shall be vested in a mayor and in a board of aldermen to be denominated the city council, and in such other officers as are herein mentioned or authorized to be elected or appointed by the city council or mayor." (Compiled Statutes 1887, Division 5, C. 22, Laws 1893, page 130). Also, that in case of a tie in any vote or proceeding of the city council, the mayor shall have the casting vote (Laws 1893, pages 126-127); also, that "it shall require a majority vote of all the members constituting the council to confirm city officers." Held, that the mayor is a constituent part of the council, and that, where there is a tie vote of the aldermen on the confirmation of an officer, he has the right to vote for confirmation.

SAME.—The city council was composed of the mayor and eight aldermen; all were present when the roll was called for confirmation; four aldermen voted in favor of confirming, the others did not vote and the mayor then voted for confirmation. Held, that the officer was legally confirmed.

Appeal from District Court, Cascade County. C. H. Benton Judge.

PROCEEDING on the relation of David H. Young against Sol. Yates to determine the right to a city office. Judgment for defendant, from which, and from an order denying a new trial, relator appeals. * Reversed.

Statement of the case by the justice delivering the opinion.

This action was brought by relator, Young, appellant here, to try the right of the defendant, Yates, to the office of city jailer of the city of Great Falls. The material and undisputed facts developed the following conditions: On June 24, 1895, at a regular meeting of the city council of Great Falls, the mayor nominated the relator, Young, as city jailer. All the aldermen, eight in number, were present at the meeting, and the mayor presided. Upon a vote for confirmation the clerk called the roll. Four aldermen voted "yea," and the other

four, though present, remained silent. The mayor voted "yea," and thus sought to confirm the relator. Thereafter the relator duly qualified as jailer, and demanded the keys and papers of the defendant. Upon a refusal to surrender, this action was brought. The district court adjudged that relator was not legally confirmed. From this judgment, and an order denying a new trial, relator appeals.

Largent & Huntoon, Ransom Cooper and Douglas Martin,
for Appellant.

A provision in a charter or law that "the mayor and aldermen when assembled together shall constitute the council," makes the mayor a member of the council. (*People v. Harshaw*, 60 Mich. 200; citing also § 385, Chapter 22, Fifth Division of the Compiled Statutes, 1887, and § 347 *Id.*, as amended on page 123, Laws of 1893; §§ 324, 325, 367, Compiled Statutes, Fifth Division; *Carroll v. Wall*, 35 Kan. 36, *Id.*, 10 Pac. 1; *Rushville Gas Co. v. City of Rushville*, 6 L. R. A. 315; *Rex v. Foxcroft*, 2 Burr 1017; 1 Wm. Bl. 229; *Warnock v. City of Lafayette*, 4 L. Ann. 419.)

Leslie & Downing, for Respondent.

Citing statute above cited, and *State ex rel. v. Gray*, 23 Neb. 577, 36 N. W. 577.

HUNT, J.—This case has been argued and briefed by both sides upon the single question of whether the relator was confirmed or not. And it is this question alone we shall decide. All the eight aldermen of the city were at the meeting of the city council on June 24, 1895. The mayor was also present. The council lawfully met. (Compiled statutes 1887, Fifth Division, C. 22, § 346.) In case of a tie in any vote or proceeding of the city council, the mayor had a casting vote; not otherwise. (Laws of Mont., 3d Sess., page 126, § 367.) The mayor is declared by the law to be the chief executive officer of the city, and, in addition to other duties imposed

upon him, he is required to preside at all meetings of the city council. This duty the mayor was duly performing at the meeting when relator's name was submitted to the council for confirmation. The mayor and board of aldermen together constituted the city council, in whom, by law, was expressly vested the corporate authority of the city. "The corporate authority of cities shall be vested in a mayor and in a board of aldermen, to be denominated the city council, and in such other officers as are herein mentioned or authorized to be elected or appointed by the city council." (Compiled Statutes 1887, Fifth Division, C. 22, § 385; Laws of Montana 1893, page 130.) Here is a plain statute declaring the mayor a part of the city council, with enumerated duties elsewhere defined, one of which is to preside over meetings of the council of which he forms a part. Considering the statutory provisions cited and others governing city authorities together, we cannot assent to the proposition that the city council is composed exclusively of the aldermen, and that they may ignore the mayor or deprive him of his right to preside, sit or vote therein in a case of a tie. The relations of the mayor towards the body of the council, the board of aldermen, are controlled by law. He has certain duties, rights and powers granted to him of an executive nature, yet he presides over and is a constituent part of the whole council exercising its legislative powers, but withal he has no right to vote except where the body over which he presides, the board of aldermen, tie in a vote or proceeding. (*People v. Harshaw* 60 Mich. 200, 26 N. W. 879.) A nomination to an office which requires confirmation by the members of the council, before becoming effective, necessarily demands a vote of the members constituting the city council who can vote. But, inasmuch as the mayor cannot vote unless there is a tie, the right to vote is necessarily restricted to the aldermen until that condition arises, when, by reason of a tie vote, the mayor may exercise his power, and confirm or reject.

We find no restriction in the law applicable to the matter of confirming officers. The provision (Laws 1893, § 347) re-

quiring a majority vote of all the members constituting the council to confirm city officers, does not expressly or by implication restrict the mayor's right to vote when the aldermen, who alone can vote ordinarily, are equally divided. But if, in voting, a tie arises, the mayor may give the casting vote, for an instance is then presented where he may exercise his power to do so, and thus determine the question before the council. Upon some matters—notably passing an ordinance over the mayor's veto—the law has required a vote of two-thirds of the whole number of councilmen elected. In such a contingency the statutes have intentionally excluded the mayor from voting; and if the legislature had intended to deny him the right to vote where a tie arises upon a confirmation, the purpose of the legislature would have been easily expressed by similar language requiring for confirmation a vote of a majority of the whole number of councilmen elected. But it has not so provided, and by the manifest difference in the statutes in respect to the votes upon ordinances passed over the veto of the mayor and those respecting appointments, we are confirmed in the belief that the legislature purposely did not mean to exclude the mayor from casting his vote in case of a tie in a confirmation as well as in cases of a tie in other matters. (*Carroll v. Wall*, 35 Kan. 36, 10 Pac. 1.) The case of *State v. Gray*, 23 Neb. 365, 36 N. W. 577, relied on by respondents was decided upon an ordinance which expressly required a concurrence of a majority of all members elected. It, therefore, is inapplicable to this case.

In the foregoing reasoning we have proceeded in part upon the hypothesis that the four aldermen who remained silent when their names were called to vote upon the question of confirmation were not only properly counted as present, but were also correctly regarded as voting in the negative, and so made a tie. Certainly the respondent cannot contend for any better position than is granted him by this assumption. It is an exploded notion that a member of a legislative body such as a city council can be present at a meeting, thus helping to make a quorum of the body, yet defeat the progress of legis-

lation by refusing to vote when the roll is called. Experience has demonstrated that it is unreasonable to permit the physical to be disunited from the official being under such circumstances. Such a practice oftentimes might give to one member, and frequently to an attending minority, an opportunity to accomplish by silence what could not be done by speech, and often render presence, though inactive, more powerful than entire absence. The courts, as well as law writers and parliamentarians generally, have adopted the more rational rule that if a member of such a body join in making a quorum, and sit, his duty is to vote (unless excused for cause), and he will be counted as present whether or not he refuses to answer to the roll call. "What the propriety of giving to a refusal to vote more potency than to a vote cast,—of allowing a gain from violation of duty, in making the refusing to vote of more effect in governing the action of the body of which one is a member than voting?" (*Launtz v. People*, 113 Ill. 144.) Thus far the recent authorities are pretty well agreed. (Horr & B. on Mun. Ord. § 43; Beach on Pub. Corp., § 289; Tied. on Mun. Corp., § 99.) The Supreme Court of the United States, in the late case of *United States v. Ballin*, 144 U. S. 1, 12 Sup. Ct. 507, have also decided that when a majority of the house of representatives are present the house is in a position to do business. "Its capacity," say the court, "to transact business is then established, created by the mere presence of a majority, and does not depend upon the disposition or assent or action of any single member or fraction of the majority present. All that the constitution requires is the presence of a majority, and, when that majority are present, the power of the house arises." There is some divergence, however, among the cases upon how to exactly construe the action of such a present member who refuses to vote. It was apparently held in the case of *Launtz v. People*, *supra* (decided in 1885), under a city charter which gave the mayor a right to vote only in a case of a tie, that if four out of the eight councilmen voted in the affirmative, and the other four, though present, refused to vote either way, the mayor might treat

those not voting as opposed to those who had voted, and decide the matter by voting in the affirmative. But in the later case of *Rushville Gas Co. v. City of Rushville* (Ind. Sup.) 23 N. E. 72, a somewhat different view was expressed, the court holding, after a review of cases, that the law is that the members present and not voting assented to the adoption of the matter then before the council. There are in some states some distinctions recognized between nominations for office and business proceedings, but it would seem that the statutes of this state do not make any such discriminations. We are inclined to the opinion that the proper rule is that those who remain silent shall be deemed to assent to the act of those who do vote. (Ang. & A. on Corp., § 127; *State v. Green*, 37 Ohio St. 227; Willc. on Corp., § 546; *County of Cass v. Johnston*, 95 U. S. 360.) This view accords with the tenor of the decision of the United States Supreme Court cited above, and is laid down by the authorities relied upon in their opinion. If this be correct, then it would seem the relator in this case was confirmed by the virtual consent of those who did not vote; and, there being no tie, the mayor's action was unnecessary. But we can safely rest our decision upon the assumption that there was a tie, and for the reasons heretofore given on that branch of the case, the judgment and order appealed from are reversed, and the cause is remanded with directions to the lower court to enter judgment in favor of relator and against respondent's right to the office of city jailer.

Reversed.

PEMBERTON, C. J., and BUCK, J., concur.

MORRILL, RESPONDENT, v. HERSHFIELD, APPELLANT.

[Submitted February 25, 1897. Decided March 1, 1897.]

Attorney—Value of Services—Hypothetical Question.

Where an attorney sues for services rendered in an action, it is not error to allow an expert to answer a hypothetical question which does not include the result of that litigation; for although that is a fact which the jury may consider, it may be brought out upon cross-examination of the witness.

*Appeal from District Court, Lewis and Clarke County.**H. N. Blake, Judge.*

ACTION by Fred B. Morrill against Aaron Hershfield, to recover for services rendered as an attorney. Judgment for plaintiff. Defendant appeals. Affirmed.

McConnell, Gunn & McConnell, for Appellant.

Citing *Stevens v. Ellsworth*, 63 N. W. 683; *Randall v. Packard*, 36 N. E. 823; *Selover v. Bryant*, 40 Am. St. Rep. 349.

C. B. Nolan and R. R. Purcell, for Respondent.

The result of the litigation is not an element to be taken into consideration in determining the value of an attorney's services. (1 Am. & Eng. Ency. of Law, 967; Weeks on Attorneys, § 577, page 693, § 343 and note; *Foster v. Jack*, 4 Watts (Pa.) 339; *Webb v. Browning*, 14 Mo. 353, 55 Am. Dec. 108; *Babbitt v. Bumpus*, 73 Mich. 331, 16 Am. St. Rep. 585, 41 N. W. 417; *Holly Springs v. Manning*, 55 Miss. 380; *Rose v. Spies*, 44 Mo. 20; *Vilas v. Downing*, 21 Vt. 419; *Knight v. Russ*, 77 Cal. 410, 19 Pac. 698; *Stanton v. Embrey*, 93 U. S. 557; *Grand Tower Co. v. Phillips*, 23 Wall. 471; *Durst v. Burton*, 47 N. Y. 167; *Jones v. Railway Co.*, 13 S. W. 416; *Ottawa University v. Parkinson*, 14 Kan. 162; *Babbitt v. Bumpus*, 41 N. W. 417.) It is well settled

that in propounding a hypothetical question the council may assume the existence of any state of facts which the evidence fairly tends to justify: (*Mercer v. Voss*, 67 N. Y. 56; *Stearns v. Field*, 90 N. Y. 640; *Filer v. New York Central R. R. Co.*, 49 N. Y. 42; *Harnett v. Garvey*, 66 N. Y. 641; *Cowley v. The People*, 83 N. Y. 470; *Kerr v. Lunsford*, 2 L. R. A. 669; *Lamoure v. Caryl*, 4 Denio 370; *Stevens v. City of Minneapolis*, 43 N. W. 843.) If opposing counsel does not think all the facts are included in the hypothetical question he may include them in questions propounded on cross-examination. (*Davidson v. State* (Ind.) 34 N. E. 973; *Goodwin v. State*, 96 Ind. 550, 555; *The Gulf Etc. Ry. Co. v. Compton*, 75 Tex. 667, 673, 13 S. W. 667; *Roraback v. Pennsylvania Co.* (Conn.) 20 Atl. 465; *Klotz v. James* (Ia.) 64 N. W. 648; *Fort Worth & Etc. Ry. Co. v. Greathouse* (Tex.) 17 S. W. 834, 837.) It is well settled that error in the admission of evidence, there being unobjectionable evidence to the same facts and no attempt to disprove them, is harmless. (*Ohio & M. Ry. Co. v. Tabor* (Ky.) 32 S. W. 168; *Milliken v. Maund* (Ala.) 20 So. 310; *Galvin v. Palmer* (Cal.) 45 Pac. 172)

HUNT, J.—Plaintiff and respondent brought this action to recover a balance due for legal services performed by him for the appellant. The appellant does not dispute the fact that the services were rendered. The action in which the plaintiff was employed was one for divorce, instituted in the district court at Fargo, N. D. The record shows that the suit was bitterly contested, and resulted in a judgment adverse to the appellant, who was the plaintiff in that action. To prove the plaintiff's allegation herein that his professional services were worth \$3,500, the plaintiff testified himself, and introduced several depositions of lawyers engaged in the practice of their profession at Fargo, N. D. Two of these lawyers, who gave their evidence by deposition,—W. F. Ball and John S. Watson, Esqs.,—testified that they represented the interests of the defendant in the divorce action, and were familiar with the case, its character and magnitude, and knew of the services

and labor performed by the plaintiff herein (Morrill), who represented the plaintiff, Hershfield, in that case. They estimated the value of plaintiff's services at from three to five thousand dollars. The evidence of these two witnesses was uncontradicted. To the other lawyers who were called to give their depositions the respondent put a hypothetical question, in which were recited the nature of the action in which plaintiff had performed the professional services sued for, the time devoted by him to the case, the trips taken by him to other places in connection with the business of this suit, the resisting of motions for alimony and suit money, the responsibility of the control, preparation and management of the case, the time the trial lasted, and other matters apparently connected with the supposed lawsuit referred to. The answers to these questions put the value of the plaintiff's services at various sums from four to ten thousand dollars. The jury awarded the plaintiff \$1,194. To such hypothetical question asked the several witnesses who were called as experts, the appellant objected, because the question propounded did not include one of the elements entering into the determination of the reasonableness of the compensation of an attorney, namely, whether or not the action in which the services were rendered was decided in favor of the defendant or against him. The court overruled the objection, and permitted the question and answers to be read to the jury, and it is this alleged error alone that appellant relies upon.

The better rule appears to be that in an action brought by an attorney to recover the reasonable value of his services in the conduct of a lawsuit, it is proper that the result of the litigation be laid before the jury as one of the elements to be considered by them in arriving at a just valuation to be put upon his services. (*Randall v. Packard*, 142 N. Y. 47, 36 N. E. 823; *Stevens v. Ellsworth* (Ia.) 63 N. W. 683.) But while it was one of the proper elements for consideration, we cannot say that it is so essential as to require us to conclude that its omission on direct examination was prejudicial to the appellant's rights. We must assume that the appellant had notice

of the taking of the depositions and of the interrogatories that were to be propounded to the experts. He therefore had an opportunity to cross-examine them, and to include the element of the result of the litigation in his cross-examination, if he desired to do so. So far as the question propounded to the experts went, it is not complained of, and the rule is that when a witness has expressed an opinion based upon facts assumed by the one whose witness he is, the opposite party may cross-examine him by taking his opinion, based upon any other facts assumed to have been proved by the evidence, provided, of course, that such hypothetical state of facts is fairly within the scope of the evidence adduced on the trial. If the question asked of the witness is defective because it does not state enough, and in the opinion of the counsel there was evidence other than that included in the hypothetical question, which he believed it was proper for the witness to consider, the attention of the witness should be called to it upon cross-examination. *Davidson v. State* (Ind. Sup.) 34 N. E. 972; *Goodwin v. State*, 96 Ind. 550; *Railroad Co. v. Compton*, 75 Tex. 667, 13 S. W. 667; Rog. on Expert Testimony, § 27.) But the question put may not be improper because it includes but a part of the facts in evidence. (*Stearns v. Field*, 90 N. Y. 640; *Mercer v. Vose*, 67 N. Y. 56; Thompson on Trials, § 625.) Moreover, the jury were fully advised by the testimony of respondent himself of the result of the litigation in which plaintiff rendered his professional services. It is also to be noted that the uncontradicted testimony of the witnesses Ball and Watson, who gave their opinions, not upon a hypothetical case, but as a result of their own knowledge of all the facts, which necessarily included a knowledge of the results, conformed to the evidence given in response to the hypothetical question put to the other witnesses. The verdict, therefore, was fully sustained by this uncontradicted testimony of the witnesses Ball and Watson alone, and the appellant is in no condition to complain of harm done him. (*Roraback v. Pennsylvania Co.* (Conn.) 20 Atl. 465; *Railway Co. v. Tabor* (Ky.) 32 S. W. 168; *Galvin v. Palmer* (Cal.) 45 Pac. 172.)

No complaint is made because of the instructions to the jury. We will therefore presume that they were in accord with the issues raised, and were warranted by the evidence given. Judgment affirmed.

Affirmed.

BUCK, J., concurs.

DICKERMAN, RESPONDENT, v. GELSTHORPE,
APPELLANT.

19	249
19	292
19	249
138	506

[Submitted February 23, 1897. Decided March 1, 1897.]

Election Contest—Australian System—Marking Ballots.

Section 1361 of the Political Code, provides that if a voter "shall desire to vote a straight party ticket, he may do so by making a cross at the head of the list representing his party ticket. If he shall desire to vote for any candidate or candidates on any other list, he shall make a cross opposite the name of every candidate for whom he desires to vote;" and section 1408 provides that "If part of a ballot is sufficiently plain to gather therefrom the elector's intention, it is the duty of the judges of election to count such part." *Held*, that where a ballot is marked with a cross at the head of a party list, which contains no candidate for a certain office, and is marked with a cross opposite the name of a candidate for that office under another list, the ballot should be counted for all candidates under the party list and for the candidate so marked.

SAME.—Where a ballot is marked with a cross at the head of a party list, and a cross is marked opposite the name or names of one or more but not all of the candidates under that list, and no other marks are made, the ballot should be counted for all candidates under the list.

SAME.—"D" and "G" were candidates for the same office; eight ballots were marked with a cross at the head of the list containing "D's" name; on the same ballots a cross was marked opposite the names of certain candidates other than "G" under another list. *Held*, that these ballots should have been counted for "D."

SAME.—If the eight ballots above referred to had also been marked with a cross opposite "G's" name, then they should not be counted either for "G" or "D."

Appeal from District Court, Cascade County. C. H. Benton, Judge.

PROCEEDING by A. E. Dickerman against W. H. Gels thorpe, to contest an election. Judgment in court below was for contestant. Reversed.

Statement of the case by the justice delivering the opinion.

This was a proceeding instituted under the provisions of Title II, part III, of the Code of Civil Procedure of Montana, to

contest an election to the office of county treasurer of Cascade county. At the election held November 3, 1896, Dickerman was a candidate for the office on the Republican and Silver Republican tickets. Gelsthorpe ran on the Democratic and People's party tickets. The official returns as canvassed showed that Gelsthorpe had received 48 votes more than his rival. Upon the trial the district court found that 72 ballots had been erroneously counted for Gelsthorpe. Each of these 72 ballots was marked with a cross in the circle either under the designation "Democratic" or "People's Party," and contained a cross opposite the name of Hartman, the candidate for representative in congress, whose name appeared in the "Silver Republican" column. Neither the Democratic nor the People's party had a candidate for congress, and there was a blank in their respective columns for that office. Exception was saved to the rejection of said ballots. The lower court, over the objection of the contestant, Dickerman, counted for Gelsthorpe 66 ballots marked as follows: with a cross in the circle under the "Democratic" or "People's Party" designation, and with a cross or crosses opposite the names of some candidate or candidates other than Gelsthorpe's in the same list under the crossed circles. The lower court also refused to count for Dickerman eight ballots marked with a cross in the circle under either the Republican or Silver Republican columns, and with a cross opposite the names of candidates other than Gelsthorpe in the Democratic and People's party list. Dickerman was declared to have been elected by 14 votes. If Dickerman had been allowed the 8 votes aforesaid, and Gelsthorpe the 72 votes mentioned, Gelsthorpe's majority would have been 50 votes. Judgment was rendered for the contestant, Dickerman. The contestee, Gelsthorpe, has appealed therefrom.

The sections of the statutes under which the questions involved in the appeal must be decided, are as follows :

Section 1354 (Political Code, codes 1895): "Ballots prepared under the provisions of this chapter must be white in color and of a good quality of printed paper, and the names must be

printed thereon in black ink. The ballots used in any one county must be uniform in size, and every ballot must contain the names of every candidate whose nomination for any special office specified in the ballot has been certified or filed according to the provisions of this title, and no other names. The list of candidates of the several parties shall be placed in separate columns on the ballot, in such order as the authorities charged with the printing of the ballots shall decide. As near as possible the ballot shall be in the following form :

REPUBLICAN.	DEMOCRATIC.	PEOPLES' PARTY.	PROHIBITION.
○	○	○	○
For Governor John E. Rickards.	For Governor. T. E. Collins.	For Governor. Wm. Kennedy.	For Governor. J. M. Waters.
For Lieut. Gov. A. C. Botkin.	For Lieut. Gov. H. E. Melton.	For Lieut. Gov. H. H. Cullum.	For Lieut. Gov. J. C. Templeton.
For Sec. of State. L. Rotwitt.	For Sec. of State. B. W. Folk.	For Sec. of State. J. W. Allen.	For Sec. of State. E. M. Gardner.

—And continuing in like manner as to all candidates to be voted for at such election. Every ballot must also contain the name of the party or principle which the candidates represent, as contained in the certificates of nomination. Below the names of candidates for each office there must be left a blank space large enough to contain as many written names of candidates as there are persons to be elected. There must be a margin on each side of at least half an inch in width, and a reasonable space between the names printed thereon, so that the voter may clearly indicate, in the way hereinafter provided, the candidate or candidates for whom he wishes to cast his ballot. Whenever the secretary of state has duly certified to the county clerk any question to be submitted to the vote of the people, the county clerk must print in the regular ballot, in such form as will enable the electors to vote upon the question so presented in the manner in this title provided. The county clerk must also prepare the necessary ballots whenever any question is required by law to be submitted to the electors of any locality, and any of the electors of the state generally, except that as to all questions submitted to the electors

of a municipal corporation alone, the city clerk must prepare the necessary ballots. The elector if he shall so desire, may vote his straight party ticket by making a cross within the circle at the head of the list representing his party."

Section 1361: "On receipt of his ballot the elector must forthwith, without leaving the polling place and within the guarded rail provided, and alone, retire to one of the places, booths or compartments, if such are provided, and prepare his ballot. If he shall desire to vote a straight party ticket, he may do so by making a cross at the head of the list representing his political party. If he shall desire to vote for any candidate or candidates on any other list, he shall make a cross opposite the name of every candidate for whom he desires to vote; in case of a ballot containing a constitutional amendment or other question to be submitted to the vote of the people, by marking an X opposite the answer of the question or amendment submitted. The elector may write in blank spaces, or paste over any other name, the name of any person for whom he wishes to vote. In marking a ballot, any elector is at liberty to use or copy any unofficial sample ballot which he may choose to mark, or have marked, before entering the compartment or booth, but no elector is at liberty to use, or bring into the polling place, any unofficial, sample ballot printed in the exact style, manner, width or character of paper of the official ballot. After preparing his ballot the elector must fold it so that the face of the ballot will be concealed and so that the endorsement stamped thereon may be seen. He must then vote forthwith, and before leaving the polling place."

Section 1403: "In the canvass of the vote any ballot which is not endorsed, as provided in this title, by the official stamp, is void and must not be counted, and any ballot or parts of a ballot from which it is impossible to determine the elector's choice, is void and must not be counted; if part of a ballot is sufficiently plain to gather therefrom the elector's intention, it is the duty of the judges of election to count such part."

Stanton & Stanton and Pigott & Veazey, for Appellant.

Respondent is seeking to sustain the judgment. He has not appealed, and although successful in his attempt to incorporate his exceptions in our bill, no argument is required to satisfy this court that his exceptions have no place therein and are not to be considered. (*Whittam v. Zahorik* (Ia.), 59 N. W. Rep. 57.) Sections 1354 and 1361 contain a provision which is identical in substance with that portion of section 22 of the election law of Iowa making provision for voting a straight party ticket: Citing 59 N. W. 61; *State v. Hagen*, 60 N. W. 108; *State v. Allen*, 62 N. W. 38; *Stackpole v. Hallahan*, 16 Mont. 40, 40 Pac. 80; *State v. Saxon*, 30 Fla. 688, 12 So. 218.

Carpenter & Carpenter, James W. Freeman and Ransom Cooper, for Respondent.

Citing *Vallier v. Brakke*, 64 N. W. 180; *McKittrick v. Pardee*, 65 N. W. 23; *Young v. Simpson*, 42 Pac. 666.

BUCK, J.—Counsel for respondent construe section 1361 in connection with section 1354 of the Political Code, as follows:

“How to Prepare Ballots. The law does not allow a voter in any case to erase any names on his ballot. The law requires voting to be by the X-mark. First, on receipt of his ballot, the elector must forthwith and alone retire to one of the compartments, and prepare his ballot as follows:

“How to Vote a Straight Ticket. (1) If the voter shall desire to vote a straight party ticket, he may do so by making a cross in the circle at the head of the list representing his political party. No other marks are necessary in such a case. Or (2) he may omit the cross in the circle at the head of the ticket, and make a cross opposite the name of each and every person on his party list for whom he desires to vote.

“How to Vote a Mixed Ticket. Omit the cross in the circle at the head of any list, and make a cross opposite the name of each and every person on any list for whom the voter desires to vote.

“How to Vote Where no Candidate’s Name is Printed. If no name of a candidate appears on his political list,—as, for instance, if no candidate for congressman is printed on a party list,—the voter may vote for a person for any such office as follows: (1) He may paste the name of the person for whom he desires to vote in the blank space left for the candidate’s name in such list, and always in such case must make a cross opposite such pasted name; or (2) he may write the name of the person for whom he desires to vote in the blank space left for the candidate’s name in such list, and always in such case must make a cross opposite such written name.”

The foregoing interpretation of the manner in which a voter should prepare the form of his ballot under said sections 1354 and 1361 is substantially correct. It is insisted, however, in behalf of respondent, that the provisions of section 1361 as to the manner in which a voter shall mark his ballot are mandatory, and that section 1403 does not justify or contemplate any other construction. Counsel for respondent ask, “What was the true purpose of section 1403?” and, answering, say: “It was this: When a voter has made an honest attempt to comply with the law, and has gone far enough to show his intention to comply with the law, in marking his ballot, then the aid of section 1403 may be invoked; as, for example, when the voter attempts to make a cross, and makes not a perfect one, * * * and when the voter does not get his cross directly opposite the name of the candidate, but a little above or below. * * * An intent expressed in a way not authorized by the law is not expressed at all. * * * Section 1403 does not impose any additional duty upon judges of election or courts. If that section was entirely stricken from the statute books, the same duty rests upon those officers of the law (judges of election). It would still be their duty to count any part of the ballot which expresses the intention of the voter in the way and manner the law directs it to be expressed, and no less a duty to refuse to count it when such intention is not so expressed.”

All this line of argument is controverted by counsel for ap-

pellant, who insist that section 1403 serves a much broader purpose, and that the provisions as to how ballots should be marked contained in section 1361 (however explicit and literally imperative the language considered by itself) are not mandatory when due weight is given to the general object of the statute, and particularly to section 1403 aforesaid.

It is a general rule that election laws must be liberally construed. This court, in *Stackpole v. Hallahan*, 16 Mont. 40, 40 Pac. 80, (on page 57, 16 Mont., and page 85, 40 Pac.), announces that "in the construction of election laws the whole tendency of American authority is towards liberality, to the end of sustaining the honest choice of the electors." The reason for this rule is that the paramount and ultimate object of all election laws under our system of government is to obtain an honest and fair expression from the voters upon all questions submitted to them. Underlying the Australian ballot system—embodied in the present election laws of this state—is the same principle. This new system was adopted because it was considered an improvement as to details on the old system adhered to in the preceding election laws of the territory. The primary object of both systems was to obtain an expression of the will of the people. The new system furnishes the latest and most modern safeguards evolved from practical experience to secure the individual volition and independence of the voter, and prevent fraud and coercion in any form. It is apparent that any form of voting prescribed by election statutes, while a natural and necessary incident, is still only an incident to the main object in the enactment of the same. In considering the details of any and all means by which an end is to be accomplished, the end itself must never be overlooked. Hence, it is our duty in this controversy—if we can, under the law—to count all ballots honestly cast; for, if the voter substantially complies with the prescribed statutory method for preparing and casting his ballot, the main purpose of the election law is complied with.

The distinctive feature of the Australian ballot system is the use of the mark in connection with the names of the candi-

dates and questions to be voted on; and, of course, unless the mark is employed to indicate the choice of the voter in his ballot, the ballot he casts is a nullity, however clearly that choice might otherwise be expressed. (See *Martin v. Miles*, 46 Neb. 772, 65 N. W. 889.) But if, from the marking of the ballot in substantial compliance with the law, the intent and choice of the voter clearly appear, then his ballot should be counted, unless the statute expressly or by clear inference forbids it; otherwise the true spirit of the election law might be violated by subordinating the essence to a mere element of detail, and substance might be sacrificed to form. The elective franchise is not conferred upon the citizen by the legislature. or by virtue of legislative enactments. The right to vote is a constitutional right, and is one of the bulwarks of our form of government and system of civil liberty.

In *State v. Russell*, 34 Neb. 116, 51 N. W. 465, the question of when statutory provisions as to the manner of voting are mandatory and when directory, is clearly discussed. The opinion by Post, J., quotes first section 190 of the last edition of McCrary on the Law of Elections. That section is as follows: "If the statute expressly declares any particular act to be essential to the validity of the election, or that its omission shall render the election void, all courts whose duty it is to enforce such statute must so hold, whether the particular act in question goes to the merits or affects the result of the election or not. Such a statute is imperative, and all consideration touching its policy or impolicy must be addressed to the legislature. But if, as in most cases, the statute simply provides that certain acts or things shall be done within a particular time, or in a particular manner and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they do, and directory if they do not, affect the actual merits of the election."

Section 448 of Paine on Elections is also quoted. The opinion then states: "The view expressed by these authors has the support of the great majority of cases in this country and

England. In fact, we are not aware that there is to be found in the reports any diversity of opinion on the subject,"—citing numerous authorities. In the dissenting opinion of Chief Justice Andrews and one of the associate justices in *Talcott v. Philbrick* (Conn.) 20 Atl. 436, on page 439, we find this language: "Doubtless the legislature has the constitutional power to place any and all restrictions about a ballot, or about the act of voting, which, in its judgment, are necessary or proper to secure independent action by the voter, or to make intimidation, cheating or bribery at the polls impossible or as nearly so as can be done by legislative enactment; and when the legislature has in clear and explicit words said that a ballot shall be void for any cause, the courts must so declare, even though the cause seems to them unreasonable. But on the other hand, no voter is to be disfranchised, and no ballot is to be declared void, on doubtful construction. All statutes tending to limit the the exercise of the elective franchise by the citizen should be liberally construed in his favor; and, unless a ballot comes within the letter of the prohibition against a particular kind of a ballot, it should be counted. A great constitutional privilege, the highest under the government, is not to be taken away on a mere technicality, but the most liberal intendment should be made in support of the elector's action whenever the application of the common-sense rules which are applied in other cases will enable the courts to understand and render it effective,"—citing authorities.

In a recent opinion of the New York Court of Appeals (*People v. Wood*, 42 N. E. 536) Andrews, C. J., says: "The object of elections is to ascertain the popular will, and not to thwart it. The object of election laws is to secure the rights of duly-qualified electors, and not to defeat them. Statutory regulations are enacted to secure freedom of choice and to prevent fraud, and not by technical obstruction to make the right of voting insecure and difficult."

Wigmore on Australian Ballot System (2d Ed. p. 193) says: "Whenever our statutes do not expressly declare that particular informalities avoid the ballot, it would seem best to

consider their requirements as directory only. The whole purpose of the ballot as an institution is to obtain a correct expression of intention; and if, in a given case, the intention is clear, it is an entire misconception of the purpose of the requirements to treat them as essentials,—that is, as objects in themselves, and not merely as means." The general rule is clear, then, that unless statutory provisions as to voting are expressly declared to be mandatory, or by clear inference were necessarily intended to be so, the courts should regard them as directory only.

Counsel for respondent urge that the provisions of section 1361 are so clear and plain that they cannot be misunderstood. We cannot agree with this statement. They are not so free from ambiguity that even an intelligent voter may not readily be misled by them. Nowhere in the election statutes of this state is there any express declaration that the said provisions of section 1361 are mandatory. The following cases have been cited as holding that "the provisions of the statute as to voting are mandatory:" *Taylor v. Bleakley* (Kan. Sup.) 39 Pac. 1045; *Lay v. Parsons* (Cal.) 38 Pac. 447; *Parvin v. Wimbera* (Ind. Sup.) 30 N. E. 790. The Kansas decision, *supra*, was rendered under an election statute which directly declared that a vote not marked in the manner prescribed should not be counted. The California opinion, above, enunciates the doctrine more by way of dictum than decision. In the Indiana case, *supra*, the court cites as one of the reasons for its decision a section of the state's statutes which declared that when a stamp was placed upon a ballot so as not to touch a square thereon, the stamp should be held to be a distinguishing mark, and the ballot, in consequence, should not be counted. The decision, in *Curran v. Clayton*, 86 Me. 42, 29 Atl. 930, does not impress us as correctly stating the law. But it is unnecessary to comment upon the decisions of other courts, for most or all of them were rendered under statutes differing from the one before us. If we construe section 1403 as appellant claims it should be construed, then the question of whether the provisions of section 1361 are mandatory or

not is readily answered. In *State v. Russell*, *supra*, the supreme court of Nebraska directly passed upon section 20 of the election laws of Nebraska; and said section 20 is almost identical with section 1403 of the Montana statute. It was contended by counsel in the Nebraska case that the scope of section 20 was of the same limited nature that respondent's counsel claim for section 1403. But the Nebraska court held otherwise, and construed it in a much broader sense. The decision in *Parker v. Orr* (Ill. Sup.) 41 N. E. 1002, is also directly in point. We are of opinion that section 1403 was clearly intended to modify sections 1354 and 1361, and that the provisions of these two last-named sections must be construed in connection with section 1403. From the language of the last-named section it is clear to us that the provisions of section 1361 as to the manner of preparing a ballot are mandatory as to the use by the voter of the cross-mark to indicate his choice, but in other respects (so far as this appeal is concerned) are merely directory. Even if the ballot is not correct in form under the requirements of section 1361, if from the cross-marks placed upon it the intent of the voter as to the whole ballot, or any part thereof, clearly appears, then the whole ballot or such part thereof, as the case may be, should be counted.

In this view of the law, can it be said that it is impossible to determine from their ballots the choice of the 72 electors whose votes were rejected by the lower court? They were marked with a cross in the circle at the head of the Democratic or People's party list, and in each a cross was placed opposite Hartman's name in the Silver Republican list or column. The name of no candidate for congress appeared on the Democratic or People's party list. We think it is clear that the intent of these voters was to cast a ballot for their own straight party ticket and also for Hartman. These voters, counsel for respondent claim, by the use of a cross opposite Hartman's name, must be held, in the eye of the law, to have intended to vote only for a congressman. Upon this theory their votes by crosses in the circle for all the other candidates listed on the

straight party tickets, even for presidential electors, were nullified. On the same principle, if a voter marks a cross opposite the name of an independent candidate for constable, standing alone in another list, his whole straight party vote would have to be sacrificed to his vote for constable. In our opinion, the cross in the circle at the top of the list is, under the statute, so far as the legal intent is concerned, equivalent to placing a cross opposite the name of each and every candidate in the list under said circle. The legal intent from the cross in the circle is not subordinate to the intent manifested by marking crosses opposite the names of particular candidates in other lists. If these 72 voters had omitted a cross in the circle, and had marked a cross opposite the name of each candidate in the list thereunder, no question would have arisen as to counting these ballots. By marking their ballots as they did, the same result was accomplished. *Whittam v. Zahorik* (Ia.) 59 N. W. 57, sustains this view. We do not agree with the doctrine in *Young v. Simpson* (Col. Sup.) 42 Pac. 666, to the effect that a cross-mark opposite the name of a candidate evinces a particular intent which controls any general intent manifested by marking a cross at the top of the party list. It follows, therefore, that the lower court committed no error in counting for appellant the 66 ballots which were marked in the circle at the top of the list, and also contained marks opposite the names of certain candidates other than appellant's in the same list. No objection, or even suggestion, is made that these 66 ballots were marked for the purpose of distinguishing them. The court rejected eight ballots marked with a cross in the circle at the top of the list in which respondent's name appeared. On these eight ballots marks also had been placed opposite the names of certain candidates other than appellant Gelsthorpe in another list. This was error. These votes should have been counted for respondent. If on these ballots appellant's name had been marked, then it would have been impossible to determine whether the voter intended to vote for respondent or appellant, and a mark in the circle at the top in favor of respondent would have neutralized the mark opposite appellant's name.

There is one other question discussed in the briefs of counsel. Testimony was offered by contestant for the purpose of showing that the respondent had not been properly nominated on the Silver Republican ticket, and for the purpose of throwing out votes which had been cast for him under that party list. It is unnecessary for us to pass upon that point here, as a similar question in another election contest is now pending before us. The judgment of the lower court is reversed, and the cause remanded, with directions to render judgment in favor of appellant in accordance with the views herein expressed. Remittitur forthwith.

Reversed.

HUNT, J., concurs.



CASES DETERMINED

IN THE

SUPREME COURT

AT THE

MARCH TERM, 1897.

PRESENT :

HON. WILLIAM Y. PEMBERTON, Chief Justice.

HON. WILLIAM H. HUNT, } Associate Justices.
HON. HORACE R. BUCK, }

GIDDINGS, RESPONDENT, v. HOLTER ET AL., APPELLANTS, and GIDDINGS, RESPONDENT, v. CASTLE LAND COMPANY, APPELLANT.

19	263
23	280

[Submitted February 24, 1897. Decided March 3, 1897.]

Covenant of Title—Corporation, Liability of Trustees on Report.

COVENANT.—The United States is a "person" included in the terms of a covenant against "all and every person or persons whomsoever lawfully claiming or to claim the same."

CORPORATION.—*Trustees' Liability.*—The trustees of a corporation who filed a report which did not specify as a debt of the company its liability on a covenant of title, are

not liable for a false report, if at the time the report was filed, the breach of the covenant was not known to them. (§ 460, Fifth Division of the Compiled Statutes, § 451 of the Civil Code construed.)

SAME.—A report filed by the trustees of a corporation which states that the capital was paid in full, is not a "false report," because of the mere fact that property for which it was issued has decreased in value.

SAME.—Trustees of a corporation who have filed a false report are not liable for debt of the corporation theretofore contracted. (§ 460 and 463, Fifth Division of the Compiled Statutes, being § 445 of the Civil Code construed.)

*Appeal from District Court, Lewis and Clarke County.
Henry N. Blake, Judge.*

ACTION by Silas M. Giddings against A. M. Holter and others and the Castle Land Company. From a judgment for plaintiff as against all the defendants, the company and the other defendants bring separate appeals. Affirmed as to the company, and reversed as to the other defendants.

Statement of the case by the justice delivering the opinion.

Action on covenants of warranty, and against the trustees of a corporation for failure to file annual reports and for a false report. The agreed statement of facts upon which this case was tried is substantially as follows: On August 5, 1890, one Quinn entered 80 acres of government land, lying adjacent to the town of Castle, in Meagher county, Montana, with Sioux half-breed scrip, and the next day conveyed the same to one Bullard. On December 16, 1890, the Castle Land Company was incorporated and organized. Bullard, having had the land platted as the King addition to the town of Castle, conveyed it on June 23, 1891, to said company. On May 1, 1891, the Castle Land Company conveyed a vacant lot in said addition to one Giddings for \$1,500, and on July 3, 1891, another vacant lot therein for \$800. The deeds of conveyance contained the following covenant: "And the said party of the first part and its successors do hereby covenant that it will forever warrant and defend its right, title and interest in and to the said premises, and the quiet and peaceable possession thereof, unto the said party of the second part, his heirs and assigns, against the acts and deeds of the said party of the first part, and all and every person or persons whomsoever

lawfully claiming or to claim the same." Subsequently Quinn's entry was contested in the United States Land Office, and on April 5, 1894, it was canceled by the secretary of the interior. On January 22, 1895, one Wilson, in behalf of the Castle Land Company, entered the King addition with soldiers' additional homestead scrip. The Wilson entry was also contested, and while the present action was pending it was canceled by order of the secretary of the interior. The fact of the cancellation of the Wilson entry does not appear in the record, but the lower court took judicial notice of it. Holter, Parchen, Seligman and King are now and were the directors or trustees of the Castle Land Company from the time of its organization. In the years 1891, 1892 and 1893, no report was filed by the company as required by section 460, page 728, Fifth Division of the Compiled Statutes 1887. Said section is as follows: "Every such company shall, annually, within twenty days from the first day of September, make report, which shall be published in some newspaper published in the town, city or village, or if there be no newspaper published in said town, city or village, then in some newspaper published nearest the place where the business of said company is carried on, which shall state the amount of capital and of the proportion actually paid in and the amount of existing debts, which report shall be signed by the president and a majority of the trustees, and shall be verified by the oath of the president or secretary of said company, and filed in the office of the clerk of the county where the business of the company shall be carried on, and if any of said company shall fail to do so, all the trustees of the company shall be jointly and severally liable for all debts of the company then existing, and for all that shall be contracted before such report shall be made. No liability shall attach to any trustee, or board of trustees, by virtue of the provisions of this section, for a failure to cause to be published in a newspaper the report in this section mentioned, if within the time herein mentioned said trustee, or board of trustees or company, shall annually cause said report to be filed in the office of the county clerk and recorder

of the county in which the business of the said company is carried on, as declared in its certificate of incorporation." On September 4, 1891, the Castle Land Company, by its trustees aforesaid, filed a report as to the affairs of the company, which stated that all the capital stock, in the sum of \$500,000, was fully and actually paid in. "At the time said last-named report was made, the only property, money, or credit, or other thing whatsoever, which had been paid in towards the payment of the said capital stock of the said company, was the interest which the company had in and to the King addition to the town of Castle, derived through said Quinn entry, which had been canceled as aforesaid." Section 463, page 729, Fifth Division of the Compiled Statutes 1887, is as follows: "If any certificate or report made or public notice given by the officers of any such company in pursuance of the provisions of this chapter, shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the company contracted while they are stockholders or officers thereof." Giddings never took any actual possession of the lots. In December, 1894, he brought suit against the Castle Land Company, on the covenants in his deeds, to recover the purchase price he had paid for the two lots, with interest from the respective dates of his deeds. The trustees of the company were made defendants in the suit, and judgment was demanded against them by reason of their failure to file reports in 1891, 1892 and 1893, and the report filed in 1894, alleged to have been false. Judgment was rendered in the district court in accordance with the prayer of plaintiff. The appeal is from the judgment.

Cullen & Toole, Sanders & Sanders and M. Bullard, for Appellants.

F. E. Stranahan, for Respondent.

BUCK, J.—The first question for decision is whether the covenant in plaintiff's deeds embraces the United States. The

covenant is against "all and every person or persons whomsoever, lawfully claiming, or to claim the same." We are of the opinion that the United States is a person, within the scope of its language. *Republic of Honduras v. Soto*, 112 N. Y. 310, 19 N. E. 845; *Stanley v. Schwalby*, 147 U. S. 517, 13 Sup. Ct. 418; *Peters v. Grubb*, 21 Pa. St. 455.) We are also of the opinion that when the Quinn entry was canceled the contingent obligation of the Castle Land Company on its covenant became fixed. Manifestly, the company had abandoned any right to the King addition under said entry when this suit was instituted. (See *Resser v. Carney* (Minn.) 54 N. W. 89.) The judgment, then, as to the Castle Land Company, is affirmed.

We shall now discuss the liability of the defendant trustees. The main question is whether or not the liability by virtue of the covenant alone is a debt, within the contemplation of section 460, Fifth Division of the Compiled Statutes. The section requires a corporation to report annually its "existing debts." The liability incurred by the Castle Land Company when it executed the deeds to plaintiff, as respondent himself contends, was not capable of enforcement in the courts until the Quinn entry was canceled, on April 5, 1894. Appellants' counsel urge that any right of action against the defendant trustees because of failures of the corporation to file reports in the years 1891, 1892 and 1893 is barred by the statute of limitations. Answering this contention, counsel for respondent says in his brief: "The difficulty with their argument is that their premises are wrong, for, while it is true that the fee had not passed out of the United States, yet the federal government had permitted the entry, and the receipt of the Register and Receiver had issued, and was the property of the Castle Land Company up to the time of its cancellation by the Department of the Interior, on April 5, 1894. During that period of the life of the certificate, the courts were closed to the plaintiff by section 542 of the First Division of the Compiled Statutes of the State of Montana, which is as follows: 'The receipt or certificate signed by the register or receiver of any U. S. Land Office of the entry or purchase of any tract of

land, or of any tract by any land warrant, is *prima facie* evidence in the courts of this state that the title to the land mentioned or described in said receipt or certificate, is in the person named therein, his heirs or assigns.' * * * And what would have been the plaintiff's standing here had he himself attacked and broken down his own title which he held through the receipt, and which the defendant company had warranted to defend in him?" The argument of counsel for appellants on this question of limitations is a somewhat inconsistent one. They insist that the covenant liability at the time of the execution of the deeds was not an existing debt, within the meaning of section 460, but, in point of fact, was so contingent in character that even the respondent could not have regarded himself as a creditor of the company at that time. Yet when they invoke the statute of limitations they assume their liability (on the theory that any breach of a covenant of warranty occurs at the moment the covenant is executed) was one in actual existence when the failures to report in 1891-92-93 occurred. In the view we take of this case, it becomes unnecessary to decide any question as to the statute of limitations, but we refer to the argument on the subject because it practically sheds light on the point of whether the covenant, at the time of its execution, was an existing debt within the contemplation of section 460. When the deeds were executed, for all that appears in the record, neither the grantee nor the grantor knew of, or had any reason to know of, any defect in the title to the lots. As to the exact time when the Quinn entry was first assailed, the record is silent. Presumably, both parties to the covenant regarded the title through Quinn as good until canceled on April 5, 1894. The status of liability under the covenant must be regarded, therefore, by us, as the same at the time of each failure to report in the years 1891, 1892 and 1893.

Section 460 does not require a corporation to report, as existing debts, unliquidated demands against it, founded on torts. Our section 460 is substantially the same as that of New York, from which state it was taken. In a case involving a con-

struction of the New York statute (*Chase v. Curtis*, 113 U. S. 452, 5 Sup. Ct. 554), the court said: "The statute involved in this discussion is not a remedial statute, to be broadly and liberally construed, but is a penal statute, with provisions of a highly rigorous nature, to be construed most favorably for those sought to be charged under it, and with strictness against their alleged liability. Under such a rule of construction, its language is limited by its own terms to a liability on the part of the trustees to debts of the corporation existing and arising *ex contractu*." It is true that a liability for a debt based upon a covenant in a deed, even before the debt is liquidated, is one *ex contractu*. But it is always somewhat difficult to clearly define the boundary between an unliquidated liability resulting from a breach of contract and one flowing from a tort. In *Mill Dam Foundry v. Hovey*, 21 Pick. 455, involving a claim for unliquidated damages for breach of a contract, Chief Justice Shaw uses the following language: "For though a question was made, whether such a claim for unliquidated damages is a debt, within the meaning of the statute, we do not think it admits of a reasonable doubt that all such claims for damages were intended to be included in the term 'debts.'" In *Carver v. Manufacturing Co.*, 2 Story 432, Fed. Cas. No. 2,485, Mr. Justice Story said: "I follow out the doctrine of the case of *Mill Dam Foundry v. Hovey*, 21 Pick. 455, which, as far as it goes, disclaims the interpretation of the word 'debt' as limited to contracts for the payment of determinate sums of money. Passing that line, it does not seem to me easy to say, that if cases of unliquidated damages may be treated as debts, because they end in the ascertainment of a fixed sum of money, that we are at liberty to say, that the doctrine is not equally applicable to all cases of unliquidated damages, whether arising *ex contractu* or *ex delicto*." The supreme court of Iowa in *Warner v. Cammack*, 37 Iowa 642, held that the liability resulting from a fraud perpetrated was a debt, in the sense of the term "debts contracted," contained in the homestead statute of that state. The court said: "We hold that it was a debt. And this because the plaintiff

in that action might have waived the tort, and brought his action for money paid to the use of the defendant therein." In *Green v. Easton* (Sup.) 26 N. Y. Supp. 553, the court held that an unliquidated claim for a breach of contract of employment was a debt, within the meaning of the New York statute, which, as we have stated, is almost identical with section 460. But in *Victory Etc. Manufacturing Co. v. Beecher*, 26 Hun. 48, the court said in reference to the same statute: "The other question under the statute is, whether the allegations of the complaint show debts existing against the corporation, within the meaning of the twelfth section (chapter 40, Laws 1848). They show, undoubtedly, causes of action for breaches of contract and causes incidentally arising or resulting from such breaches, which would entitle them to recover damages against the company unless met and defeated by some sufficient defense. But it is very doubtful whether such causes of action are debts, within the meaning of the act. If they are debts, would not the company be bound to include them in the annual report of existing debts to be made under section 12? The statute says the report must state the amount of existing debts. Is it the intention that the report shall state, as 'existing debts,' the amount of disputed and contested claims? If that be so, then the statute would operate in many cases as a confession of indebtedness destructive of good defenses. The words 'existing debts' must have been used in some more restrictive sense, or else the statute might operate to subject the trustees to liabilities which may not be capable of recovery against the corporation itself; for, if they are to be regarded as existing debts, then their omission would be fatal to the validity of the report. * * * The courts are bound to observe the distinction of law between debts and demands or claims for damages." The court also said: "The courts have held that certain kinds of liability, which must ultimately ripen into debts are not debts, within the meaning of the act of 1848 and similar acts. (*Oviatt v. Hughes*, 41 Barb. 541; *Whitney Arms Co. v. Barlow*, 68 N. Y. 34.)" The case of

Green v. Easton, *supra*, it seems to us, is apparently in conflict with *Manufacturing Co. v. Beecher*, *supra*. But a distinction can be drawn between a claim which actually exists in the form of a debt—even though an unliquidated one—upon the breach of a contract, and a liability not ripened even into the semblance of actual debt, but merely possible as a debt from the existence of an agreement or contract. The contract before us does not fall within the rule laid down in *Green v. Easton*. In that case the facts evidently disclosed a conceded breach of contract prior to the time of filing the corporate report. In our opinion, in no sense within the meaning of “existing debts,” as that term is used in section 460, was this covenant in these deeds a debt in 1891, 1892 and 1893. It constituted a contingent obligation only, not ripened into a debt during the period of the contest of the Quinn entry. To hold that this section contemplates that the trustees of a corporation should be held liable for failures to report mere possibilities of debt, even though founded on contracts, would be a harsh doctrine. Such a doctrine would seriously impede the business operations of corporations. It would practically necessitate the inclusion in their annual reports of details of a character oftentimes trivial and wholly immaterial. It would fasten a responsibility of so burdensome a nature on a trustee of a corporation that no man of ordinary prudence would agree to accept such a position. It would violate the rule laid down in *Chase v. Curtis*, that this section “is a penal statute, with provisions of a highly rigorous nature, to be construed most favorably for those sought to be charged under it, and with strictness against their alleged liability.” We are clearly of the opinion that the defendant trustees are not liable for the failure of the Castle Land Company to make reports in the years 1891, 1892 and 1893.

The next question for our consideration is whether or not the report of the company made in 1894 was a false report. From the record, we cannot say that it was false. It in no wise appears, even inferentially, that the King addition did not cost the Castle Land Company the amount of money for

which it issued its capital stock. If the capital stock was paid in full, the mere fact that the land representing it had become valueless would not render its officers or stockholders liable for any debts of the company. This action of plaintiff's is not one to make stockholders liable for unpaid stock. The allegations of the complaint show that the plaintiff seeks to recover from the trustees solely on the ground that they made a false report. He relies upon section 463 of the Fifth Division of the Compiled Statutes of Montana. Even, however, if the report is false, can plaintiff avail himself of any false statement in it? The contract of the Castle Land Company under the covenant of warranty had ripened into an actual debt liability, and plaintiff's right to sue had accrued, before this report of 1894 was made. Section 463 is strictly a penal statute, and we agree with the interpretation placed upon it by the supreme court of New York in *Torbett v. Godwin* (Sup.) 17 N. Y. Supp. 46; the Montana section 463 being identical with section 21 (chapter 611, Laws 1875) of the New York statute construed in said case. The debts for which officers of a corporation who make a false report are liable are not those contracted by the corporation prior to the making of a false report, but those contracted subsequent thereto. This is a reasonable and fair construction of this section under the rule heretofore announced for the construction of penal statutes of this character. The judgment of the lower court as to the defendant trustees was erroneous, and must be reversed. The case is remanded, with directions to the district court to render judgment for the defendant trustees.

Two separate appeals were taken from the lower court's decision,—one in behalf of defendant trustees, and the other in behalf of the Castle Land Company,—and two transcripts are in this court. The costs of appeal in the one numbered 842 must be paid by the respondent, and in the one numbered 843 must be taxed to the Castle Land Company.

Remanded.

HUNT, J., concurs.

STATE EX REL. BROOKS, APPELLANT, v. FRANSHAM,
RESPONDENT.

19	273
19	474
19	273
29	555

[Submitted February 23, 1897. Decided March 8, 1897.]

Contested Election—Remedies—Statutory Construction—Ballots—Nomination by Individuals Under Party Names.

CONTESTED ELECTION—Remedies.—Where the same legislature gives two remedies for the enforcement of a right, effect should be given to each statute.

SAME.—Accordingly, *held*, that in this state a person claiming to have been elected to an office, may bring a proceeding under section 2010 in the nature of *quo warranto*, although section 1414 same Code gives another remedy for a trial of the same question.

BALLOTS—Nominations by Individuals.—Where a political party is regularly organized and has a party name, candidates nominated by petition of electors belonging to that party are not entitled to be placed on the ballot under the name of that party; party nominations cannot be made by petition.

SAME.—Under section 1351, 1354 and 1356 of the Political Code, the ballots are prepared and provided by the respective county clerks; and it is the duty of the clerk to publish in one or more newspapers the nominations, at least ten days before the election (Section 1318, Political Code); *held*, that the object of this publication is to afford opportunity to correct errors and omissions before elections. (§ 1322 of the Political Code.)

SAME.—*Held*, accordingly, that unless the corrections are made before the election, the ballots cannot be rejected because the nominations were not properly made.

SAME.—The fact that the district judge of the county was also a candidate for re-election and thus disqualified, does not change the rule; application could be made to any other district judge.

BALLOTS—Marking.—The laws of this state permit an elector to vote a straight party ticket by marking a cross at the head of his party, or he may mark a cross opposite the name of every candidate on the list; if he desires to vote for a candidate or candidates on another list, then he must make a cross opposite the name for every candidate for whom he desires to vote. *Held*, that, where there are two candidates for the same office, ballots which are marked with the cross at the head of the list containing the name of one of the candidates, and with a cross opposite the name of the other, cannot be counted for either, as it is impossible to ascertain the intent of the voter.

Appeal from District Court, Gallatin County. F. K. Armstrong, Judge.

QUO WARRANTO on the relation of W. Randolph Brooks to determine the right of William J. Fransham to the office of sheriff of Gallatin county. From a judgment in favor of defendant, relator appeals. Reversed.

T. J. Walsh, for Appellant.

The elector's nomination was utterly void. (*State v. Rotwitt*, 46 Pac. 370; *State v. Reek*, 46 Pac. 438; *State v. Tooker*, 46 Pac. 530.) Upon the second ground of contest, namely: the error in counting for defendant, ballots marked with a cross at the top of the democratic column, and also opposite his name, we submit without additional comment the following authorities: (*Vallier v. Brakke*, 64 N. W. 180; *McKittrick v. Pardee*, 65 N. W. 23; *Curran v. Clayton*, 29 Atl. 930; *Heiskell v. Landrum*, 46 Pac. 120; *People v. Seaman*, 5 Denio, 409; *Newton v. Newell*, 6 N. W. 346; *People v. Cicott*, 16 Mich. 306.)

Luce & Luce, for Respondent.

Where authority is given to do a particular thing and the mode of doing it is proscribed, it is limited to be done in that mode; all other modes are excluded. (Sutherland on Statutory Construction, §§ 326-327; *Thurston v. Prentiss*, 1 Mich. 193) Specific provisions relating to a particular subject must govern in respect to that subject, as against general provisions in other parts of the law which might otherwise be broad enough to include it. (*Pell v. Pell*, 19 Wis. 196; *Smith v. Stevens*, 10 Wal. 321; citing also *Gorham v. Lockett*, 6 B. Mon. 146; § 1410-1414, Code of Civil Procedure; *Ames v. Kansas* 111 U. S. 449; *Foster v. Kansas*, 112 U. S. 201; *Attorney General v. Sullivan*, 28 L. R. A. 455; *State v. Marlow*, 15 Ohio St. 114, opinion 134; *Smith v. Lockwood*, 13 Barb. 209; *Dudley v. Mayhew*, 3 N. Y. 9; Sedgwick on Construction of Statute and Constitutional Law, 94; Cooley on Constitutional Limitation, 133, see also 207-208-209; *People v. Mahaney*, 13 Mich. 481; *Peabody v. School Committee*, 115 Mass. 383.) This action is not prosecuted by the attorney general or by his authority, nor is it presumed to be an action brought by the people of the state of Montana for an alleged usurpation, but is brought distinctly under the provisions of section 1414, Code of Civil Procedure to determine a private right.

By section 1410, Code of Civil Procedure, the action is

made a civil action, and section 1414 makes it incumbent upon the person desiring to bring *quo warranto* where he claims to be entitled to a public office unlawfully held and exercised by another, to file an undertaking to pay any judgment for costs or damages recovered against him, and all costs and expenses incurred in the prosecution of the action. Nothing is better settled than that the extraordinary remedies of injunction, *mandamus* and *quo warranto* are not grantable where the party aggrieved can obtain full and adequate relief in the usual course of proceedings at law, or by the ordinary forms of civil actions, or by a specific mode provided by statute. (High on Extraordinary Legal Remedies, §§ 617, 618, 637, 645; *People ex rel. Lord v. Every*, 38 Mich. 405; *State v. Wilson*, 2 Pac. 828, opinion 836, and cases there cited; *People v. Hillsdale, Etc. Turnpike Co.*, 2 Johns, 190.) Counsel cited the following cases on other questions: *State v. Burdicks*, 46 Pac. 854; *People v. District Court*, 18 Col. 26, 31 Pac. 339; *Simpson v. Osborn*, 52 Kan. 328, 34 Pac. 747; *Manston v. McIntosh*, 60 N. W. 672; *Phelps v. Piper*, 67 N. W. 755; *State v. Johnson*, 46 Pac. 440; *Shields v. Jacob*, 88 Mich. 164, 50 N. W. 105; *State v. Benton*, 13 Mont. 306, 34 Pac. 301; *Stackpole v. Hallahan*, 16 Mont. 40; *Kirk v. Rhoads*, 46 Cal. 404; *Gumm v. Hubbard*, 97 Mo. 311, 11 S. W. 61; *Ailen v. Glynn*, 29 Pac. 670-673; *Bowers v. Smith*, 17 S. W. 761; *Miller v. Pennoyer*, 31 Pac. 830-831.

HUNT, J.—This is an appeal from a judgment of the district court of Gallatin county adjudging that the relator take nothing by reason of his action, and that the respondent recover his costs. The complaint alleges that the relator, Brooks, at the general election in November, 1896, was the Democratic candidate for sheriff of Gallatin county, and that the defendant, Fransham, was the Republican candidate, having been regularly nominated by the Republican county convention of Gallatin county. Relator further alleges that on November 11, 1896, the board of canvassers of Gallatin county declared and certified that Fransham had received 1,080 votes

for sheriff, and that Brooks had received 1,034 votes, whereupon Fransham was declared elected and a certificate issued to him. Relator, Brooks, then avers that the Silver Republican party has existed in Montana at all times since September 9, 1896, and by its convention had nominated candidates for electors for president and vice president of the United States, for representative in congress, and various state officers for the state of Montana, and had published its principles, but that no convention of said party was ever held in Gallatin county to nominate candidates for county offices or for any purpose. It is also alleged that the principles advocated by the Silver Republican party were much more popular in Gallatin county than the principles of the Republican party, and that subsequent to the adjournment of the Republican county convention for Gallatin county the various candidates of the Republican party for the various county offices to avail themselves of the advantages arising from the popularity of the Silver Republican party, "and with the view to represent themselves and have themselves represented to the electors of the said county of Gallatin as the candidates of the said Silver Republican party, caused to be circulated among the electors of the the said county of Gallatin certain lists, headed with a recital, in substance, to the effect that the said individuals so theretofore nominated by the county convention of the Republican party of the said county of Gallatin were thereby, by the electors signing the same lists, nominated as the candidates of the said Silver Republican party for members of the state legislature and the various county offices, each individual so nominated being nominated for the same office for which he had been theretofore nominated by the said Republican convention; that the said lists so circulated were signed by the number of electors of said county requisite to make nominations for the said offices by electors acting independently of the convention, and that, having been so signed, the said lists were as one document filed in the office of the county recorder of the said county of Gallatin; and that relator avers that, save and except as aforesaid, none of the said individuals, nor any other

person, was ever nominated by the said Silver Republican party as candidate for any county office for the said county of Gallatin." And relator further avers that immediately prior to October 23, 1896, the supreme court of the state had pending before it several cases, in which the validity of other nominations made in other counties of the state as the candidates of the Silver Republican party for county and district offices was challenged, which said nominations were made in the same manner as just set forth concerning the alleged nomination of candidates of said Silver Republican party for county offices in Gallatin county; that is, by the independent action of electors signing lists headed with a recital, in substance to the effect that they thereby nominated certain persons named as the candidates of the Silver Republican party. It is averred that on October 23, 1896, the supreme court of this state handed down its decisions affecting nominations attempted to be made in the manner hereinbefore set forth, and that thereupon the county attorney of Gallatin county advised the county clerk of that county of the decisions of the supreme court, and that the lists filed with him were invalid as nomination certificates, and that the candidates therein named were not entitled to appear upon the official ballot of Gallatin county, except as candidates of the Republican party, and that he should not print the ballots with the names of any persons thereon as the candidates of the Silver Republican party for county offices of said county; that thereupon, on October 23, 1896, the county clerk declared to relator his intention to print and circulate the official ballots for the ensuing election, to be held on November 3, 1896, with no names appearing thereon under the heading of the Silver Republican party, or with the group of candidates of said party, except those of such persons as had been nominated by it for presidential electors, representative in congress, and state officers. The relator avers that in accordance with the advice of the county attorney the county clerk caused to be printed on October 23d a large number of sample official ballots for said county, on which there appeared no names of candidates of the Silver Re-

publican party except for electors for president and vice president, member of congress and state officers; but that, disregarding the advice so given, the county clerk later on the same day, at the instigation of said alleged nominees of the Silver Republican party for county offices, ceased to print the ballots in form as aforesaid, and caused to be printed, and thereafter to be distributed among the various precincts of the county, official ballots on which all of the candidates of said Republican party appeared under the head of the Republican party, and also under the heading of the Silver Republican party, and that such ballots, and no others, were used at all of the precincts of Gallatin county. The relator avers that one W. L. Holloway appeared as the Republican candidate for judge of the Ninth judicial district, and that one F. K. Armstrong was at the time judge of said district court, and was also at that time the Democratic candidate for re-election; that Holloway's name appeared in the lists hereinbefore referred to, purporting to have been nominated as the candidate of the Silver Republican party for judge, and that his name appeared upon said official ballots under the heading of the Silver Republican party, by reason of which facts the said F. K. Armstrong was disqualified from hearing any proceedings that might have been brought to obtain redress for the unlawful acts of the county clerk in printing and distributing the said ballots; that the relator and others, who were candidates of the Democratic party, on learning on October 23, 1896, of the purpose of the county clerk in the matter of printing the official ballots of Gallatin county intended to apply to the supreme court to have the county clerk enjoined from printing or distributing any official ballots for Gallatin county with any names appearing thereon as the candidates of the Silver Republican party for county offices for Gallatin county, when they learned the fact that the supreme court had declared on that day that it would hear no more cases touching the validity of nominations or regularity of ballots for the ensuing election. The relator then avers that at the election more than 200 ballots were cast in the various precincts of Gallatin

county in which the voter designated his choice of candidates by marking a cross in the circle at the head of the group of candidates of the Silver Republican party, and not otherwise, and that each of said ballots so cast was counted and returned by the election officers as a vote for Fransham for sheriff; that if 47 or more of said ballots, marked as aforesaid, had not been counted for Fransham, the relator would have received a greater number of votes than Fransham, and would have been elected. The relator makes a further complaint, averring that in the precinct of South Bozeman at least 30, and at the precinct of Chestnut at least 20, ballots were cast in which the voters marked a cross within the circle at the head of the list or column headed "Democratic party," and also placed a cross at the left of the name of said Fransham where it appeared in the list headed "Silver Republican Party," and that all of the ballots so cast were by the judges and clerks of election of said precincts returned as votes for the said Fransham for sheriff and were included in the number of votes so found to have been received by Fransham by the board of county canvassers. The relator then alleges that the defendant usurped the office of sheriff of Gallatin county, and he demands judgment against said defendant and in favor of his own right. To this complaint the defendant demurred generally and specially. The district court sustained the demurrer. The relator declined to amend his complaint, and permitted judgment to go against him.

A question of jurisdiction is raised *in limine* by the contention of defendant that this action cannot be maintained at all as one in the nature of *quo warranto*, and that it was not instituted within the time allowed by law for contesting an election for a county office, and that, therefore, the lower court had no jurisdiction of the subject-matter. By section 2010 *et seq.*, Code of Civil Procedure, any elector may contest the right of any person, declared to be elected to an office to be exercised in a county, town or city, for any of four grounds, one of which is on account of illegal votes. It is further provided by section 2015 that, when the reception of illegal votes

is alleged as a cause of contest, the party contesting such election must deliver to the opposite party, at least three days before such trial, a written list of the number of illegal votes, and by whom given, which he intends to prove on the trial, and no testimony can be received of any illegal votes, except such as are specified in such list. It would seem, therefore, as if by the use of the words "illegal votes" in a proceeding to contest an election, under the statutes cited, the legislature meant votes cast by persons disqualified as electors under the constitution and laws of the state, and that no reference was intended to contests over the proper method of counting votes confessedly cast by qualified voters. But, if our construction of the statute on this point is too narrow, we still find that by the later and better-considered authorities the relator herein should not be denied the right to maintain this action in the name of the state, under section 1414 of the Code of Civil Procedure, wherein it is provided that "a person claiming to be entitled to a public office, unlawfully held and exercised by another, by himself or by an attorney and counselor at law, may bring an action therefor in the name of the state as provided in this chapter," etc. Concerning the right to institute a proceeding in the nature of *quo warranto*, where there exists a statutory method for testing the results of an election, Spelling, in his work on Extraordinary Relief (section 1776), says: "Upon the question whether the existence of a statutory method for testing the results of an election will constitute a bar to the proceeding, the authorities are not altogether harmonious; but nearly all the recent authorities are to the effect that such statutory remedy does not exclude the remedy by *quo warranto* to try title." McCrary on Elections (section 395) has the following: "A statute which confers upon any elector of the proper county the right to contest, at his option, the election of any person who has been declared to be duly elected to a public office, to be exercised in and for such county, does not oust the jurisdiction of the proper court, on information in the nature of a *quo warranto*, to inquire into the authority of any person who assumes to exercise the functions

of a public office or franchise, and to remove him therefrom if he be a usurper, having no legal right thereto." In *State v. Adams*, 65 Ind. 393, it was insisted by the appellee that the court had no original jurisdiction over the subject-matter of the suit by information for a writ of mandate, because the relator had an adequate legal remedy under an act of that state for contesting elections. The code of Indiana enacted that "when any person shall usurp, intrude into, or unlawfully hold or exercise any public office, or any franchise within this state, or any office in any corporation created by the authority of this state," an information might be filed against any person or corporation by the prosecuting attorney, "or by any other person on his own relation, whenever he claims an interest in the office, franchise or corporation which is the subject of the information." The court said it was clear to them that the relator might seek the remedy he asked under the statute, and that while it was also clear, as a general principle, that a party is not entitled to a writ of mandate when he has any other adequate legal remedy, "yet, where the statute expressly gives the right by information, we do not think another statute giving another adequate legal remedy will take away the right given by information." Paine on Elections (section 861), citing the Indiana cases, says: "Nor will the adoption of a special statutory proceeding for the trial of cases of contested elections, in the absence of express provision to that effect, abrogate the right to a trial upon an information in the nature of a *quo warranto*, secured by an unrepealed statute of the same date with that which establishes the statutory proceeding." (*People v. Londoner* (Col. Sup.) 22 Pac. 764.) In *State v. Frazier* (Neb.) 44 N. W. 471, the relator therein brought his original petition in *quo warranto* against one Frazier, of Dakota county, alleging substantially that at an election held relator received a majority of all legal votes cast at said election, and was duly elected to the office of county attorney, but that the defendant refused to deliver possession of the office to relator. The respondent in that case raised the point that the relator should be denied his remedy

by *quo warranto* because he had an adequate remedy at law, pursuant to certain statutes of Nebraska providing for contesting elections. Justice Cobb discusses with much learning the argument of respondent, and thus regards it: "The statute nowhere in terms makes these provisions exclusive of all other remedies; so that if they are to be so considered it must be by force of that general proposition so often invoked, and laid down with more or less accuracy, that neither injunction in equity, nor *mandamus* at law, can be resorted to where the party aggrieved can obtain full and adequate relief in the usual course of proceedings at law or by the ordinary forms of civil action. Mr. High, in his work on Extraordinary Legal Remedies, at section 617, says that 'a striking analogy exists between the remedy by *quo warranto*, information and the extraordinary remedies' above referred to. He also lays down the rule that 'where a specific mode is provided by statute, * * * and a specific tribunal is created for that purpose, and the method of proceeding therein is fixed by law, resort must be had to the remedy thus provided, and proceedings by information in the nature of a *quo warranto* will not be entertained.' (*Id.*) The author cites to the above: *State v. Marlow*, 15 Ohio St. 114; *State v. Taylor*, *Id.* 137; *Com. v. Henszey*, 81 Pa. St. 101; *People v. Every*, 38 Mich. 405; *State v. Wadkins*, 1 Rich. Law 42; *People v. Whitcomb*, 55 Ill. 172; *People v. Ridgley*, 21 Ill. 66; *Dart v. Houston*, 22 Ga. 506; *People v. Turnpike Co.*, 2 Johns, 190. I have examined all the above cases except *People v. Whitcomb*, 55 Ill. 172, which I do not find in the library, and do not find any one of them to sustain the text, with the exception of *State v. Marlow*, 15 Ohio St. 114, which is the case discussed by Chief Justice Lake in *Kane v. People*, 4 Neb. 509. I am, therefore, of the opinion that the remedy by contest, under the provisions of the statute above cited, in cases like the one at bar, is a cumulative, and not an exclusive one, and that the objections to the procedure by *quo warranto*, and to the jurisdiction of this court to hear and determine it, must be overruled." If the learned judge had been able to read the opinion in *People v.*

Whitcomb, 55 Ill. 172,—not accessible to him,—he would have included it in the statement that the cases cited by High in the first edition of his book on Extraordinary Legal Remedies (section 617) do not warrant his text. In the last or third edition the learned author reverses the views he held in the first edition, which must have been the book referred to by Justice Cobb, for he expressly writes that the better considered doctrine is that the existence of a statutory remedy does not oust the jurisdiction of courts by *quo warranto* or prevent the people from resorting to this remedy to determine questions of usurpation to public office.

In *People v. Holden*, 28 Cal. 124, Sanderson, C. J., for the court, held that the act providing a mode for contesting elections conferred upon any elector of the proper county the right to contest the election of any person who had been declared duly elected to a public office to be exercised in and for such county; but that this grant of power to the elector could in no way impair the right of the people in their sovereign capacity to inquire into the authority by which any person assumed to exercise the functions of a public office, and to remove him therefrom if it was made to appear that he was a usurper and without legal right thereto. The court then speaks of the remedies by information in the nature of a *quo warranto* as a power granted to the people in the right of their sovereignty. But it is to be observed that under section 1414 of the Montana Code of Civil Procedure exactly the same power is given to a person claiming to be entitled to a public office unlawfully held by another, to bring an action in the name of the state, as is given to the attorney general. So that all that the California court said sustains the proposition that the contested election statute and the remedy by *quo warranto* remain as concurrent remedies. In the recent case of *Snowball v. People*, 147 Ill. 260, 35 N. E. 538, a *quo warranto* proceeding was had to try the title of appellant to the office of a member of the board of education of a county. It was there also contended that the proceeding was merely an election contest, and that such contests could only be determined by the county

court, and not by the circuit court, in a *quo warranto* proceeding. The court said: "There seems to be some disagreement among the authorities upon the question whether proceedings by information in the nature of *quo warranto* are excluded, where a statute prescribes a specific mode for contesting elections, and designates a particular tribunal for determining such contests. It has been held in Ohio and Pennsylvania, and perhaps in some other states, that, where a specific mode of contesting elections has been provided by statute, that mode alone can be resorted to, and that the common-law mode of inquiry by proceedings in *quo warranto* will not be entertained. (*State v. Marlow*, 15 Ohio St. 114; *Com. v. Leech*, 44 Pa. St. 332; *High on Extraordinary Legal Remedies*, § 617.) It will be found upon examination, that the decisions, which thus hold, are based upon peculiar statutory and constitutional provisions, which do not exist in this state. (*People v. Hall*, 80 N. Y. 117.) But, independently of such provisions, the weight of authority is in favor of the position, that the special remedy given by statute in such cases is merely cumulative, and not exclusive, of the remedy by *quo warranto*. The general principle is that, in the absence of any controlling constitutional restrictions upon the subject, the jurisdiction of the courts to proceed by information in the nature of *quo warranto* is not taken away by a statute which prescribes a special proceeding, unless there are express words in the statute itself taking away such jurisdiction, or unless it appears to have been the manifest intention of the legislature to confine the remedy to the prescribed proceeding and to the designated tribunal. (1 Dillon on Mun. Corp. (4th Ed.) § 202 (old § 141) and notes.)" See, also *State v. Gallagher*, 81 Ind. 558, and *State v. Meilike* (Wis.) 51 N. W. 875. The case of *Gillespie v. Dion*, 18 Mont. 183, 44 Pac. 954, was an election contest instituted specially under the Compiled Statutes of 1887, and before the adoption of the Codes of 1895. It was not contended in that case that the action was one brought in the nature of a *quo warranto* proceeding, and questions herein raised were not involved in that case and were not considered by the

court. We think, therefore, that where the two sections providing for contesting the right of a person to hold an office were passed at the same session of the legislature, effect should be given to each, if possible, and that the proper construction of the statutes heretofore referred to is that the remedy of *quo warranto* is concurrent with the right to institute an election contest.

The case for consideration on its merits stands as one of conceded facts. The Silver Republican party was at the election of 1896 in Montana an existing political organization within the state, and within many of the counties of the state. Just prior to its independent existence as a political party its members affiliated with the Republican party, and agreed in convention of the Republican party upon the same state ticket; but immediately thereafter, in the exercise of its independent political rights, it made its own nominations for presidential electors, and effected an organization. It also nominated local candidates for office in various counties of the state. But in Gallatin county, as a party, the Silver Republicans did not regularly, in convention or otherwise, nominate local candidates. A number of individual electors of that county did, however, attempt to nominate as the candidates of the Silver Republican party for local offices the same persons as the Republican party had previously nominated as its candidates for such offices. These attempted nominations having been by petition, wherein individual electors sought to make the persons named the candidates of the party whose name they used in the petition of nomination, were invalid and worthless as party nominations. We have already decided in the cases of *State v. Rotwitt*, 18 Mont. 502, 46 Pac. 370, *State v. Tooker*, 18 Mont. 540, 46 Pac. 530, and *State v. Reek*, 18 Mont. 557, 46 Pac. 438, that the statutes do not permit a nomination of a person as the candidate of a regularly existing political party to be made by petition of unorganized electors, and, furthermore, that a candidate, certified as nominated by electors, is not nominated by a political party, and has no right to be placed on the official

ballot as the candidate of an organized existing party. These decisions were made after careful consideration of our statutes, and must stand. It was therefore the duty of the county clerk of Gallatin county to omit from the Silver Republican column of the official ballot the names of all persons so attempted to be nominated by electors as the candidates of that party for local offices. But the clerk failed to do his duty, and without authority inserted and published in the official ballot the relator's and other persons' names as candidates for local offices in the Silver Republican column, beneath the names of those candidates for state offices who had been regularly nominated in state convention by the Silver Republican party. The case comes, then, to this: What is the effect of the unauthorized conduct of the county clerk upon the votes cast for the candidate for sheriff by the marking of the ballots within the circle under the caption of the Silver Republican column?

No embarrassment confronts us by reason of the alleged lack of qualification of the voters who voted the ballots presented; nor is the case complicated by any contention on the relator's part that the ballots which were marked were not official ballots,—that is, printed ballots prepared and provided by the county clerk, whose duty it was under sections 1351, 1354, 1356 of the Political Code, to cause the ballots to be printed and delivered to the judges of election. Section 1318 of the Political Code requires the county clerk, at least 10 days before an election is held, to publish in one or more newspapers within the county the nominations to office, certified to him as required by law. The object of this requirement is to authoritatively present to the electors an accurate list of names of the persons who have been duly nominated for offices to be filled by the voters; and, in the absence of any averment in the complaint to the contrary, we will assume that the ballots printed and delivered by the county clerk to the judges of election, and voted by the electors, were the same, in substance and arrangement of columns, and contained the same statement of names of candidates, together with the

principles or parties represented by such candidates, as were included in the published list of nominations made 10 days before election, as required by the above referred to provisions of the law. So we must conclude that the form of the ballot was regular on its face. It was apparently the ballot made up exactly as the statute required it should be made up. Now, when a voter called for a ballot, the judges gave such a ballot to him, marked as required by law (section 1360 of the Political Code), with the designation "Official Ballot" stamped thereon. The voter, by an examination of the ballot so given to him, was entirely unable to tell that the Silver Republican candidates for local offices never had been legally nominated as the candidates of that party; nor was it patent that the county clerk of Gallatin county, in making up the official ballot, had not done his duty by inserting the names of any candidates not nominated according to law. (Political Code, § 1354.) The error in them could not be discerned on inspection; it was latent. The ballot was the only one authorized to be handed to a voter, and to be used by him. He could mark and return no other without violating the law. The voters were innocent and honest in their acts. These propositions are indisputable.

But relator now asks the court to throw out the votes of 200 qualified voters, who honestly used ballots furnished for their use by the authorities of the county, because the county clerk violated his duty by putting the names of candidates who were not legally nominated by the Silver Republican party in the party column of that party. This is a request to have 200 legal votes rejected. He raises no question of the intent of these 200 voters, or of their methods of voting, but relies upon the argument that the county clerk's violation of the law made the official ballot a falsehood, and by the use of the ballot presented the voter was led to vote for a candidate upon the representation that he was the candidate of the party under the title of which his name appeared, when in fact he was not such candidate. Let us grant that this is true; yet it cannot avail the relator in this case. It must always be remembered

that the publication of the nominations for 10 days prior to the election was an official announcement to the electors as a fact that defendant was the candidate of the Silver Republican party, and was duly nominated by that party for the office of sheriff, and would be on the official ballot as the Silver Republican candidate, unless, of course, it might after publication be otherwise ordered by the courts. Furthermore, the announcement was made in order that any errors or omissions in the publication of the names or descriptions of the candidates nominated for office, or in the printing of the ballots, might, upon application of any elector to the district court, be corrected, or cause shown for not making the correction. (Political Code, § 1322.) The last-cited statute contemplates and authorizes the institution of proceedings to cure, not alone clerical omissions or errors, but likewise extends to instances of defects by way of omission of names of candidates from the ballot, as well as to erroneous insertions of names of persons as candidates who are not in fact entitled to be so regarded, and whose names, unless stricken off the official ballot, will be erroneously printed thereon.

It is well known that the interests of candidates of parties are generally managed and jealously guarded by committees located at central points, and whose duties are to vigilantly protect their candidates against possible prejudice or error on the part of all persons, officially or otherwise, taking necessary or important or active part in connection with election affairs. Candidates, too, are usually alert to protest against any infringement of the law whereby they may be put to disadvantage. In order to give to them, as well as to all others, the clearest understanding of what ballot is to be given to the judges of election for electors by the county clerk, the law has imposed upon that official the duty of making proper publication, and simultaneously accorded to any elector a correlatively important right of calling upon the courts to compel the legal and proper performance of his duty. But, where there is a neglect on the part of one to avail himself of this right, he cannot, when the result of the election is announced

and he finds himself defeated at the polls, ask the courts to nullify the expressed will of voters upon the ground of the error or wrong of the county clerk, which he could by reasonable diligence have had corrected by invoking the statutory provisions at the proper time. As said by Andrews, C. J., in the case of *People v. Wood* (N. Y. App.) 42 N. E. 536: "We can conceive of no principle which permits the disfranchisement of innocent voters for the mistake or even wilful misconduct of election officers in performing the duty cast upon them." Or it might be put in this way: If no ante-election objection to a nomination is made, the provisions of the statute are to be treated as directory. This principle, although apparently departed from in *Price v. Lush*, 10 Mont. 61, 24 Pac. 749, was none the less the underlying one of the late decision in *Stackpole v. Hallahan* (Mont.) 40 Pac. 80, and is the basis of other numerous late and well-considered opinions (*Bowers v. Smith* (Mo. Sup.) 20 S. W. 101; *Allen v. Glynn* (Col. Sup., 1892) 29 Pac. 670; *Miller v. Pennoyer* (Or., 1893) 31 Pac. 830; *Brangdon v. Navarre* (Mich., 1894) 60 N. W. 277), and the two opinions rendered during the same week in December, 1895, by the courts of Idaho and New York, respectively. (*Baker v. Scott*, 43 Pac. 76; *People v. Wood*, *supra*.) In considering this case we acknowledge great aid from the last case cited.

Possibly a case might be conceived of where the official ballot given to the voter was not the one published at all by the county clerk; as, for instance, where the county clerk delivered to the judges at the last moment ballots containing different names from those published as the candidates nominated and where the misconduct was such that by no possible reasonable effort could it have been prevented, because of the deception and misconduct of the officer. It might be that under such circumstances the rule should be relaxed because of the possible inapplicability of the general principle stated; but no such case is presented here, and, even if there were, it is difficult to see how, under the constitution of our state (section 13, article 9), the person who receives the highest number of

votes cast by qualified voters can be denied the constitutional right to the office to which he has been so elected. There is wisdom in that construction of election laws which holds rigidly to the doctrine that in our country, where the will of the people is supreme, when clearly expressed it cannot be defeated by a claim that an official neglected to properly make up the ballot published and voted. A party or candidate may be defeated by an official's wrong, but the electors must be secure in the knowledge that their votes, when legally cast will be counted. And we cannot hold to the contrary, unless compelled to do so by mandatory provisions of law and construction requiring such votes to be held void, not in our constitution or codes. The argument that the ballot was a falsehood, and that no person should profit by it, has considerable force, we admit; but it is not strong enough, under the facts admitted by the demurrer to the complaint herein, to outweigh the more important controlling principle that the electors, who do not make up the ballot, must rely with perfect assurance and safety upon the official ballots given them, and that their ballots will be counted as marked, and that their legally expressed will cannot be overthrown where they are not at fault, although it should turn out that the public officer who had to do with the preparing of the ballot voted may have neglected his duty.


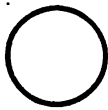
The relator's complaint is wholly insufficient in its averment of fact to warrant us in concluding that the defendant instigated the county clerk to commit the error or wrong of publishing the Silver Republican candidates' names in the manner he did, or that the clerk did so with the actual knowledge and consent of the defendant. We, therefore, find it unnecessary to construe any possible effect upon the result of the election that sections 60, 103, 111, Corrupt Practice Act (Penal Code), may have.

We think, too, that the excuses offered by the relator for lying by and waiting until election was over are too trivial for serious consideration. If Judge Armstrong was a candidate, and thus disqualified from issuing orders in the premises, re-

lator could easily have gone to another district judge, and obtained an order of correction or to show cause. He does not pretend that he made any real effort to cure the error.

These views dispose of the first branch of the case, and lead to our approval of the ruling of the district court thereon.

The second ground of contest raises this question: How should a ballot be counted where, as is shown by the illustration below, a voter marked a cross within the circle at the head of the column marked "Democratic Party," and also placed a cross at the left of the name of defendant where it appeared in the column headed "Silver Republican party?"

	Democratic Party.		Silver Republican Party.
			
	For Governor, Robert B. Smith.		For Governor, Alex. C. Botkin.
	For Sheriff of Gallatin County, W. Randolph Brooks.	X	For Sheriff of Gallatin County, William J. Fransham.

This feature of the case becomes material, for the reason that relator alleges that at least 50 ballots so marked were counted and returned as votes for Fransham, and were counted and included in the sum total of his 1,080 votes. Inasmuch as relator received 1,034 votes, it follows that if Fransham was allowed 50 votes not legally cast for him it would reduce his votes to 1,030, or four less than the relator received. The learned district judge was of the opinion that the defendant was properly credited with votes marked for him as above indicated, construing the intention of the voter who so marked

his ballot to be to vote for all the Democratic candidates except for sheriff, and for that office he voted for defendant, the Silver Republican candidate. This construction was founded upon section 1403 of the Political Code, which is fully quoted and discussed in *Dickerman v. Gelsthorpe* 19 Mont. 249, 47 Pac. 999. In that case we held that section 1403 was intended to modify sections 1354 and 1361 of the Political Code, and that they must be construed together. It was further decided, as applied to the ballot just illustrated, that marking in the circle at the head of the Democratic list is, under the law,—so far as the legal intent of the voter is concerned,—equivalent to placing a cross opposite the name of each and every candidate in the list under said circle. In other words, we think that the permission to the voter to mark in the circle at the head of the Democratic list was simply, in effect, saying to him: “You may, instead of making crosses opposite the names of each and every candidate on this list, make one cross in the circle at the top, and by doing so you express your intent to vote for each and every candidate of the Democratic party, just as fully and as specifically as if you marked opposite the names of each and every such one.” “The legal intent,” says Justice Buck in that opinion, “from the cross in the circle is not subordinate to the intent manifested by marking crosses opposite the names of particular candidates in other lists.”

This being the law, therefore, we find that the averment of relator’s complaint is to the effect that at least 50 voters, by marking a cross in the circle at the top of the Democratic column, expressed an intent to vote for Brooks, but by also marking a cross opposite the name of Fransham, on the Silver Republican ticket, they expressed their intent to vote for Fransham. Such a marking of the ballot renders it impossible, in our judgment, to determine whether the voters legally intended to vote for relator or for the defendant, for the mark in the circle at the top of the Democratic column, although apparently in favor of relator, was neutralized by the marks in the Silver Republican column opposite defendant’s name.

The voter who so marked his ballot has really voted for two opposing candidates for the same office, and for sheriff his ballot cannot be counted at all. If there had been no candidate in the Democratic column named for sheriff, and the cross was opposite the name of Fransham in the Silver Republican column, the facts would bring the case squarely within the Dickerman-Gelsthorpe decision; but the difference is most significant, and it is impossible to say just what the voter meant by marking his ballot as he did. As we have said, the circle mark being of equal significance with the cross mark opposite the name, the corollary of that, and the equivalent statement that the voter has distinctly expressed his intent to vote for two men, is that, so far as that part of the ballot is involved, it becomes impossible to determine the elector's choice, and such a vote or votes must not be counted for either candidate. The sequel of what we have said is that the district court extended the rule of liberality of construction of section 1403 beyond a point where we think it can be properly applied. The court should have overruled the demurrer upon this branch of the case, and required defendant to answer the averments concerning the votes in the precincts of South Bozeman and Chestnut. The judgment is, therefore, reversed, and the case remanded, with directions to the district court to overrule the demurrer, and require defendant to answer the averments pertaining to the South Bozeman and Chestnut voting precincts.

Reversed and Remanded.

BUCK, J., concurs.

PABST BREWING CO., RESPONDENT, v. MONTANA
BREWING CO., APPELLANT.

[Submitted February 23, 1897. Decided March 15, 1897.]

Contracts—Interpretation—Rules of Court.

CONTRACTS—Interpretation.—S, who had conveyed to the defendant corporation land to which he did not have perfect title, deposited stock in escrow the terms of which provided that, if S at any time when the title could be perfected failed to make the payments necessary to obtain the deed, the defendant might make the payment, and should thereupon be entitled to so much of the stock as should at its then cash value be equal to the amount so paid by it. *Held*, that when S failed to make payment, defendant might do so, and that in the absence of fraud S was not entitled to notice.

SAME.—Under such a contract neither S nor his assignee, the plaintiff, was entitled to recover the full amount of stock in escrow upon tendering to defendant the amount which it had paid to perfect title.

PRACTICE—Rules.—The object of rules of court is to facilitate the dispatch of business; they cannot be invoked to bar a right unless a failure to comply with them is clear.

Appeal from District Court, Cascade County. C. H. Benton, Judge.

ACTION by the Pabst Brewing Company against the Montana Brewing Company and another. From a judgment in favor of plaintiff, and from an order denying a new trial, the defendant Montana Brewing Company appeals. **Reversed.**

Statement of the case by the justice delivering the opinion.

This was an action for the recovery of 1,000 shares of the capital stock of the Montana Brewing Company, a corporation doing business in Great Falls, Mont. The facts necessary for the statement, so far as this appeal is concerned, are substantially as follows: Schmitz and other persons associated with him had a written contract, under the terms of which within a certain time they were to erect a brewery on a certain town lot, and to pay therefor the sum of \$5,000 to the owner, the Great Falls Water-Power & Townsite Company, and upon these conditions being complied with the said last-named company was to give them a good and sufficient deed for said lot.

In this contract April 8, 1894, was the limit of time within which the brewery should be erected and the \$5,000 paid; but there was a provision, also, that, if the brewery should be built and the money paid before said date, the townsite company would execute its deed for the lot prior to April 8, 1894. Soon after entering into this contract, Schmitz and his associates organized the Montana Brewing Company. They then entered into a written contract with the Montana Brewing Company, wherein it was agreed that the said company should erect the brewery under the first contract, and issue them 5,000 shares of its capital stock. The second contract contained, also, the following provision: "It is further agreed between the parties hereto that the said parties of the first part (Schmitz et al.) shall at the earliest possible date procure a deed, and perfect their title to the land hereinabove described; and should, at any time when the same can be perfected, the parties of the first part hereto refuse to or neglect to make the payments necessary, at the date mentioned therefor, on the said contract between the Great Falls Water-Power & Townsite company and the parties of the first part hereto, the said Montana Brewing Company shall have the right and privilege of making said payments itself, and perfecting the conveyance hereinabove referred to from the Great Falls Water-Power & Townsite Company to A. F. Schmitz and Joseph Trimborn; and there shall be deducted from the five thousand shares of the capital stock of the said company so placed in escrow a sufficient amount thereof, which at the cash value of said stock at the said time will be equal to the amount so required to be expended by the Montana Brewing Company to perfect said title, which the said trustee is authorized to deliver over to said company upon affidavit being made by the president of the company to that effect." Under this agreement Schmitz and his associates placed in escrow a deed to the lot, and 5,000 shares of the capital stock of the Montana Brewing Company were also placed in escrow. The holder as trustee of this deed and these shares of stock, one Johnson, during the period in which this controversy arose, was an

officer of the Montana Brewing Company. Upon December 11, 1893, the Montana Brewing Company had erected a brewery, but there was still due from Schmitz, of the \$5,000 to be paid to the townsite company, the sum of \$524.60. This amount was paid by the Montana Brewing Company, and thereupon a deed was executed from the townsite company to Schmitz and the persons interested therein, and the one from them to the Montana Brewing Company was delivered. Upon demand and affidavit filed, the trustee who held the 5,000 shares of stock in escrow delivered Schmitz's proportionate share of the same, namely, 1,000 shares, to the Montana Brewing Company. Meanwhile, on August 19, 1893, Schmitz had assigned 1,000 shares in the Montana Brewing Company to the Pabst Brewing Company, of Milwaukee, Wis. The Pabst Brewing Company brought suit against the Montana Brewing Company and the trustee or holder of the instruments in escrow to recover the 1,000 shares of stock assigned to it. It offered in its complaint to pay anything due on said stock which the Montana Brewing Company might have advanced in payment of the lot on which the brewery was erected to the townsite company. To this suit one Webster was also made a defendant. Webster, on December 20, 1893, as a creditor of Schmitz, had attached certain money (\$1,500) held by the Montana Brewing Company to the credit of Schmitz. In its answer the Montana Brewing Company admitted that it held \$1,500 belonging to Schmitz. Upon the trial it appeared in the evidence that, after the organization of the Montana Brewing Company, Schmitz and the other incorporators had agreed to advance money to the company for the purpose of enabling it, as Schmitz testified, to meet its obligations and requirements for erecting the brewery and paying for the lot, but, as the other incorporators testified, upon an express agreement that each one of the incorporators was to receive 1,000 shares of the capital stock upon payment, each, of \$5,000, and not until such payment,—the money so received to be used in the erection of the brewery by the company, and not for payments due on the lot. Schmitz admitted in his testimony that he

was to be repaid for what moneys he should advance under the last aforesaid agreement in stock, but claimed that each incorporator had the privilege of taking only so much stock as he might desire. Schmitz had paid to the Montana Brewing Company \$1,500 prior to August 19, 1893, when he assigned to the Pabst Brewing Company. In behalf of plaintiff, the Pabst Brewing Company, a witness testified that, after the assignment of stock to it by Schmitz, he had demanded of the trustee, Johnson, some time in August or September, 1893, the 1,000 shares of stock, and had offered to pay what was due thereon, he did not know, because the trustee, Johnson, who was an officer of the corporation, would not inform him, how much was due on the stock, and made no tender of any money. Schmitz, who also testified in behalf of plaintiff, stated that no demand had been made on him to pay his share of what remained due on the purchase price of the lot. The testimony as to the value of the stock of the Montana Brewing Company on December 11, 1893, was vague in character. It appears that at said date there was no sale for it, and therefore no market price. Prior thereto, however, sales had been made of stock at the rate of \$5 per share, and even as high as \$10 per share. The defendant Webster disclaimed any interest in the 1,000 shares of the stock plaintiff claimed Schmitz had assigned to it. The trial court made no special findings, but decided that, upon the payment by the Pabst Brewing Company of \$524.60, the Montana Brewing Company should assign to it 1,000 shares of its capital stock. The appeal is from an order denying a motion for a new trial, and the judgment in favor of plaintiff.

Leslie & Downing and R. W. Berry, for Appellant.

A. J. Shores and Douglas Martin, for Respondent.

BUCK, J.—It is insisted that the alleged errors relied upon for reversal of this case are not set forth in appellant's brief in the manner required by subdivision 3 of rule 5 of this court and hence should not be considered. The main object of this

and similar rules is to facilitate the dispatch of business. Such rules cannot be invoked to bar a right unless a failure to comply with them is clear. After inspection of the brief we are of opinion that, while it may be somewhat defective, it nevertheless sufficiently calls attention to the errors assigned in the statement on motion for a new trial.

It is apparent from the decision of the court below that the trial judge found against respondent's contention that the Montana Brewing Company should have paid the sum of \$524.60 due on the purchase price of the townsite lot with the funds in its hands belonging to Schmitz. If this were not true, the decree would not have directed respondent to pay that sum as a condition precedent to the right to have transferred to it the 1,000 shares of stock. The contract between the Montana Brewing Company and Schmitz et al. bound the latter to procure a title to the townsite lot as soon as possible, and provided expressly that, in the event of a refusal or neglect to procure such title, the Montana Brewing Company might pay whatever balance was due the townsite company, and deduct from the shares of the capital stock in escrow a sufficient amount of said stock, which, at the cash value of said stock at the time of such payment, would be equal thereto. There is no ambiguity in this last mentioned provision of the contract, and on what theory the lower court ordered the entire 1,000 shares of stock to be transferred to the respondent we are unable to determine. It clearly ignored the contract provision, and in doing so committed error. If, too, the lower court found the value of the stock of the Montana Brewing Company to be one dollar per share on December 11, 1893, it erred in this respect also. The evidence was that prior to said date shares of said stock had been sold at a much greater rate than one dollar per share, and that on December 11, 1893, there was absolutely no market sale for it. It does not follow that, because there is temporarily no sale for property, it is without value; and, under testimony showing such a condition of affairs, a court has no right to find arbitrarily that property so situated is of a certain value.

Appellant had a right to repayment of the \$524.60 expended in procuring a title to the townsite lot in stock of the value thereof on December 11, 1893. Respondent, as assignee of Schmitz, had no greater interest in the 1,000 shares of the stock in escrow than its assignor. Schmitz had bound himself to procure title to the townsite lot "at the earliest possible date." This he neglected to do. He was not entitled to any notice, nor was his assignee, of the time when it was possible to procure a deed to the lot. The respondent should have ascertained that fact itself as a part of its assignor's contract obligation. The pleadings do not allege any fraud, nor from the evidence in the record is any fraud disclosed, whereby respondent was prevented from a compliance with the terms of Schmitz's express engagement to procure a title to the townsite lot at the earliest possible date.

It is suggested in his brief that respondent would be entitled to any dividends paid on the assigned Schmitz stock, or so much thereof as ought to be transferred to it. With this we agree. On such shares of the said 1,000 shares of stock as it may be entitled to after the amount to be deducted by the Montana Brewing Company at the cash value of the stock on December 11, 1893, is ascertained, all dividends received by the Montana Brewing Company should belong to respondent. The record, however, does not disclose that any dividends were ever paid, and we mention this only for the future guidance of the court below in the adjustment of this controversy, if any dividends were ever paid.

The order denying the motion for a new trial, and the judgment, are reversed, and the cause is remanded for a new trial in accordance with the views herein expressed.

Reversed and Remanded.

HUNT, J., concurs. PEMBERTON, C. J., not sitting.

HENRY C. STIFF, APPELLANT, v. H. W. McLAUGHLIN,
SHERIFF, RESPONDENT.

[Submitted March 12, 1897. Decided March 22, 1897.]

*Indian Reservation—Levy of Execution—Right of Entry—
Consent of Agent.*

Entry on Indian lands by an officer to levy an execution issued by a state court on property of one not an Indian, but residing on the Indian land by consent of the tribe, is not interdicted by the provision of the enabling act of Montana that all Indian lands in the state "shall remain under the absolute jurisdiction and control of the Congress of the United States."

One not an Indian acquires no tribal relations by marriage with an Indian woman and residence on a reservation.

The provision of article 2 of the treaty of 1855 with the Flathead Indians, that there might be placed on their reservation "other friendly bands of Indians of the Territory of Washington," who might agree to be consolidated with the Flathead Nation, does not authorize the adoption into the tribe of a quarter-breed Chippewa, who is married to a Flathead woman.

The fact that a man is permitted by the United States authorities to reside on a reservation with his Indian wife does not raise a presumption that the government intended he should acquire the status of a tribal Indian.

A refusal of an Indian agent to consent to entry by a sheriff on the reservation to levy execution on the property of one not an Indian does not excuse the sheriff from making the levy.

Advice of a United States district attorney that the sheriff had no right to enter the reservation without the agent's consent does not excuse the sheriff from making the levy.

Appeal from District Court, Missoula County. F. H. Woody, Judge.

ACTION by Henry C. Stiff against H. W. McLaughlin, sheriff of Missoula county, and others. There was judgment for defendants on the pleadings, and the plaintiff appeals. Reversed.

Statement of the case by the justice delivering the opinion.

Appellant (plaintiff below) on July 2, 1895, caused an execution to be issued on a judgment in force against one Sloan, and delivered it to the sheriff of Missoula county, requesting him to levy upon certain personal property belonging to Sloan, a list of which he furnished that officer at

the same time. The property consisted of cattle, horses, harness, wagons, and agricultural implements in the possession of Sloan near Mud Creek, on the Flathead Indian reservation, in Missoula county, Montana. The sheriff refused to make the levy, and subsequently appellant instituted the present suit against him and his bondsmen to recover damages alleged to have been sustained by said failure and refusal to make the levy. The answer of respondents (defendants below) contains no denial of the allegation of the complaint, but seeks to justify the refusal of the sheriff to make this levy. It alleges: "That the said Allen Sloan, upon whose property he (the sheriff) was directed to levy said execution, is a Chippewa Indian of the quarter blood; that he is married to an Indian woman belonging to the Flathead tribe of Indians; that at all the times mentioned in the complaint, and for many years prior thereto, the said Sloan and his wife resided and still reside upon the Flathead Indian reservation in the state of Montana, and that his right to so reside upon said Indian reservation has been and is recognized and allowed by the authorities of the United States in charge of and having jurisdiction over said Flathead Indian reservation; that all the property of said Sloan upon which said defendant was directed to levy said execution was, at all the times mentioned in said complaint, upon said Flathead Indian reservation." It is also alleged that the sheriff applied to the Indian agent in charge of said Flathead Indian reservation, and to the United States district attorney for the district of Montana, for permission to enter upon the reservation and make the levy, and that the said Indian agent refused such permission, and the said district attorney advised that he (the sheriff) had no authority to enter upon the reservation for the purpose of making the levy. The treaty entered into between the United States and the Flathead, Kootenay and Upper Pend d'Oreilles Indians, on July 16, 1855, and proclaimed April 18, 1859, contains the following provision: "Article 2. There is, however, reserved from the lands above ceded, for the use and occupation of the said confederated tribes, and as a general Indian reservation, upon which may

be placed other friendly tribes and bands of Indians of the Territory of Washington who may agree to be consolidated with the tribes parties to this treaty, under the common designation of the 'Flathead Nation,' with Victor, head chief of the Flathead tribe, as the head chief of the Nation, the tract of land included within the following boundaries: * * * Nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without the permission of the confederated tribes, and the superintendent and agent." The court below denied appellant's motion for judgment on the pleadings, but rendered judgment on the pleadings in favor of respondents, and the appeal is from said judgment.

Bickford, Stiff & Hershey, for Appellant.

F. C. Webster, for Respondents.

BUCK, J.—The case of *Draper v. United States* (recently decided by the supreme court of the United States) 17 Sup. Ct. 107, in our opinion, disposes of this appeal. The facts in that case were that Draper, a negro, murdered a negro woman on the Crow reservation, which is within the boundaries of Custer county, Montana. He was indicted and convicted in the circuit court of the United States for the district of Montana. The supreme court holds that said circuit court had no jurisdiction of the crime, following *United States v. McBratney*, 104 U. S. 621. The Draper opinion discusses the legislation organizing the Territory of Montana, the enabling act of congress admitting Montana as a state, and the ordinance adopted by the Montana constitutional convention providing: "And said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States," etc. It also reviews the provision of the treaty with the Crow Indians, and the various acts of congress as to Indians and Indian reservations, and the decisions of the United States courts pertinent to the question of jurisdiction of state and United States courts over Indian reservations. It is unnecessary,

therefore, for us to recapitulate the reasoning from which the conclusions of law in the McBratney and Draper decisions, *supra*, were reached. In the McBratney case is the following language: "The record before us presents no question under the provisions of the treaty as to the punishment of crimes committed by or against Indians, the protection of the Indians in their improvements, or the regulation of congress of the alienation and descent of property and the government and internal police of the Indians. The single question that we can or do decide in this case is that stated in the certificate of division of opinion, namely, whether the circuit court of the United States for the district of Colorado has jurisdiction of the crime of murder committed by a white man upon a white man within the Ute reservation, and within the limits of the State of Colorado; and, for the reasons above given, that question must be answered in the negative." In the Draper case the court said: "Of course the construction of the enabling act (of Montana) here given is confined exclusively to the issue before us, and therefore involves in no way any of the questions fully reserved in *United States v. McBratney*, and which are also intended to be fully reserved here." There is nothing in the treaty between the United States and the Flathead Indians to except the Flathead Indian reservation from the law as to the jurisdiction of the state courts of Montana laid down in the Draper decision with reference to the Crow reservation.

Counsel for respondents say in their brief: "At the time the answer was drawn in this case, and the motion for judgment on the pleadings was argued, the respondents relied largely on the decisions of United States District Judge Knowles in cases before him (*United States v. Partello*, 48 Fed. 670; *Truscott v. Cattle Co.*, 73 Fed. 60), in which he had decided, in effect, that state officers had no jurisdiction or right to enter upon Indian reservations in Montana to execute process issued out of state courts. While this principle has been limited, and to some extent overruled, in recent decisions of the court of appeals at San Francisco (see *Truscott*

v. *Cattle Co.*, *supra*), and by the recent decision of the supreme court of the United States in the Draper case, we believe still that this is the law governing the facts involved in this case. While the answer was drawn under the view that the officer had no right to levy an execution from a state court on property on an Indian reservation in any case, still, happily, the answer sets up certain facts, namely, those alleging the tribal relations of the judgment debtor Sloan to the United States and the confederated tribes of Indians on the Flathead reservation, which clearly show that the respondent sheriff had no jurisdiction to execute the particular process mentioned in the pleadings in this action. The sheriff had no jurisdiction to go upon the reservation, and violate and disturb such tribal relations, without the consent of the proper officers of the United States who are the guardians of such Indians. The answer sufficiently shows by the facts stated that Sloan, the judgment debtor, was an Indian ward of the United States government, sustaining tribal relations to the Flathead tribe of Indians, and affiliated to them, and lawfully residing on said Flathead reservation with his property there; and we still contend that the sheriff, under the circumstances, had no right to go upon said reservation, and levy the execution upon said Indian's property." The allegations in their answer relied upon by respondents' counsel appear in the statement. From these allegations, simmered down, it appears that Sloan, the judgment debtor, was a quarter breed (not an Indian) married to a Flathead Indian woman, and residing with her on the Flathead Indian reservation by the permission of the Flathead Indians and the United States authorities. The only language in the Flathead treaty, from which it can be even remotely inferred that the Flathead and the other confederated tribes on the Flathead reservation had the right to adopt Sloan into their tribe and invest him with the privileges and immunities enjoyed by themselves as tribal Indians, is set forth in the statement. But clearly this language of the treaty admits of no such inference. It provides, perhaps, for the adoption into their tribe of friendly tribes and bands of Indians of

Washington Territory. But the Indian blood in Sloan was Chippewa. He was exactly in the same position as if he had had no Indian blood in him at all. The marriage of a man not an Indian to an Indian woman does not give him the status of a tribal Indian, nor does he acquire such a status from the fact that he resides upon an Indian reservation with an Indian wife. Unless in the government's treaty with the Flathead Indians themselves, or under some act of congress, a right was expressly given the Flathead Indians to adopt persons other than tribal Indians of Washington territory into their tribe, no court would be justified in holding that any such right existed. Their treaty gave no such right to the Flatheads as we have stated, and we know of no law conferring any such right. Nor from the fact that the United States authorities permitted Sloan to reside on the reservation can it be reasonably inferred that he had acquired, or that it was intended by the government that he should acquire, the status of a tribal Indian. We cannot agree with this contention of respondents' counsel. It is conceded that the property which the sheriff refused to levy upon was personal property. Sloan, the owner, was not a tribal Indian. By going upon the Flathead Indian reservation, and taking Sloan's personal property into his custody, the sheriff would not, in our opinion, have necessarily interfered with the Indians themselves, or infringed upon their rights as a tribe under their treaty. The refusal of the Indian agent to grant permission to the sheriff to enter the reservation is no justification of the failure to levy the execution. The agent had no right to refuse such permission. Nor was the advice given the sheriff by the United States district attorney any excuse for said sheriff's failure to perform a duty enjoined upon him by the laws of Montana. We are of the opinion that the court erred in giving judgment on the pleadings for the respondents. The judgment is reversed, and the cause remanded, with direction to the court below to render judgment on the pleadings in favor of appellant.

Reversed.

HUNT, J., concurs. PEMBERTON, C. J., not sitting.

19	306
21	164
19	306
29	266
19	306
30	539

BUTTE BUTCHERING CO., RESPONDENT, v. CLARKE
ET AL., APPELLANTS.

[Submitted March 11, 1897. Decided March 22, 1897.]

*Appeal—Transcript—Practice on Motion to Vacate Default—
Defect in Summons—Waiver.*

APPEAL—Transcript.—On an appeal from a judgment entered upon an amended complaint, it is not necessary to include in the transcript the original complaint, the demurrer thereto, or the order made by consent sustaining the demurrer.

SAME.—All motions and orders referred to in affidavits used on a motion to open a default should be made a part of the transcript on appeal from an order denying such motion.

OPENING DEFAULT JUDGMENT.—Affidavits may be filed contradicting the matters set forth to excuse a default in answering.

SAME.—*Held*, on the facts presented by the record, that the order refusing to set aside the default would be sustained.

JUDGMENT BY DEFAULT.—It will not be assumed that in entering judgment by default the court below did not comply with the law.

SUMMONS—Waiver of Defect.—Where defendant has appeared generally by demurrer, a judgment will not be reversed for a defect in the summons.

Appeal from District Court, Silver Bow County. William O. Speer, Judge.

ACTION by the Butte Butchering Company against S. H. H. Clarke and others, receivers of the Union Pacific System. From an order denying their motion to vacate a judgment by default, defendants appeal. Affirmed.

Statement of the case by the justice delivering the opinion.

This was an action to recover the value of 84 head of calves. In the court below respondent (plaintiff) filed a complaint, and summons was issued thereon. Appellants (defendants) appeared and demurred to the complaint. The record on appeal shows that the demurrer was sustained by consent, and that thereupon an amended complaint was filed. To this amended complaint appellants, on November 9, 1894, interposed a motion. What the character of this motion was nowhere appears in the record, save in certain affidavits which are set forth later in the statement. This motion was argued and submitted

on February 2, 1895. It was overruled on March 23, 1895, and the appellants were allowed 10 days in which to file an answer. No answer was filed. On June 18, 1895, a default was entered against all the defendants, and on the next day judgment taken against them. On June 29, 1895, a motion was filed to set aside the default, which was denied on September 14, 1895. Appellants tendered an answer, and filed an affidavit of the attorney who had represented them, in support of the motion to set aside the default. The affidavit sets forth that, after the filing of the motion of November 9, 1894 (which is described in the affidavit as a motion to require the plaintiff to elect upon which cause of action it would stand), the attorney for appellants was a member of the legislature, and while a member of the legislature said motion was taken up, submitted to the court, and overruled. "The affiant says he does not remember of consenting to the taking up and submission of the said motion; that he does not remember of ever having any notice of the submission of the said motion, and did not know that the said motion had been taken up and submitted until after the default had been entered herein. Affiant further says that, upon his return from the legislature, he supposed that the said motion was still pending, but made no effort to have it disposed of for the reason that, some time prior to the default herein, negotiations had been in progress between the general agent and the plaintiff, looking to a settlement of this case; that, a few days prior to the default being entered, the affiant was approached by a representative of the plaintiff with a view to affecting a settlement of this case. After some conversation was held in respect to the matter, it was understood that the said representative of the plaintiff should see the general agent of the defendants, who had authority to settle the case. Affiant says that he had every reason to believe the said representative of the plaintiff would see the said general agent, and that the case would be settled. With this impression and understanding affiant went to Helena, where he had important business in the supreme court; and that while he was so engaged, and without further notice,

the default and judgment were made and entered herein. Affiant further says that, but for his understanding that the case would be settled, he would have filed an answer." The counter affidavit filed in behalf of respondent sets forth that for the convenience of the attorney for appellants the hearing of said motion for election had been postponed from time to time; that no less than three times appellants' attorney had been notified of the motion being set for hearing, and that finally said attorney appeared in person and argued said motion on February 2, 1895; that after the argument and submission of the motion, which was taken under advisement by the court, appellants' said attorney stated to the court that, inasmuch as he was a member of the legislature, and might not be present at the time of the decision of the motion, he would like 10 days to answer in the event of the ruling being adverse to his clients. It is also stated in the affidavit that the legislature adjourned *sine die* on March 7, 1895. The amended complaint contained three counts. The first count alleges a contract between plaintiff and defendants whereby the latter agreed to transport 84 calves for plaintiff from a point in Utah to Butte, Montana. It alleges a breach of the contract in the delivery of said calves, "to the damage of plaintiff in the sum of \$541.20." It admits a credit on account of the damages in the sum of \$147.95. The second count alleges a contract, and avers a breach as to the delivery of the calves, and also sets forth that appellants butchered said calves, and converted the same to their own use, and that the value of said calves so converted was \$541.20, on which there is a certain credit. The third count alleges a contract, a breach, and avers a conversion and the value of the calves as in the second count. It further alleges that defendants agreed to pay plaintiff for said calves and have not done so in full. The judgment is as follows: "[Title of Court and Cause.] In this action, the defendants S. H. H. Clarke, Oliver W. Mink, E. Ellery Anderson, John W. Doane and Frederick R. Coudert, receivers of the Union Pacific System, and the said Union Pacific System, having been regularly served with summons, and having ap-

peared in this action by their attorneys, Shropshire & Burleigh, by motion, and their said motion having been by the Court overruled, and the time for answering having expired, and the default of the said defendants in the premises having been duly entered according to law, now, on this day, on application of F. T. McBride, attorney for said plaintiff, it is ordered that judgment be entered herein against the said defendants S. H. H. Clarke, Oliver W. Mink, E. Ellery Anderson, John W. Doane and Frederick R. Coudert, receivers of the said Union Pacific System, as such receivers and against the said Union Pacific System, in accordance with the prayer of plaintiff's complaint on file herein. Wherefore, by reason of the law and the premises aforesaid, it is ordered and adjudged that the Butte Butchering Company, the plaintiff herein, do have and recover of and from the said defendants S. H. H. Clarke, Oliver W. Mink, E. Ellery Anderson, John W. Doane and Frederick R. Coudert, receivers of the Union Pacific System, as such receivers, and the said Union Pacific System, the sum of three hundred and ninety-three and 25-100 dollars, and plaintiff's costs herein, taxed at nine dollars. [Signed.]” This appeal is from the order denying a motion to set aside the default, and from the judgment in behalf of plaintiff.

J. S. Shropshire, for Appellants.

F. T. McBride, for Respondent.

BUCK, J.—At the time this appeal was argued, counsel for respondent by formal motion suggested a diminution of the record, and asked that the same be corrected by the insertion of copies of the following papers: The original complaint and defendants' demurrer thereto, and the order overruling the same; defendants' motion to elect upon which count in its amended complaint plaintiff would stand; the order overruling said motion; and the order overruling defendants' application to set aside the judgment. It is not necessary that this transcript on appeal should set forth the original complaint, the

demurrer thereto, or the order made by consent sustaining such demurrer. The amended complaint superceded the original complaint filed. (See *Raymond v. Theuton*, 7 Mont. 299, 17 Pac. 258.) The transcript, however, should contain a copy of the motion to elect, or some more formal description of it than it does. The mere reference to it in the affidavits on the motion to set aside the default is not a proper method of presenting it to the consideration of this court. So, also, the court's orders overruling said motion, and the application to set aside the default, should be set forth with more formality than they are. The transcript in reference to these two orders is as follows :

Record of the Proceedings in This Cause as is Found in the
Register of Actions.

1894.

Nov. 1.	Motion.	Amended complaint filed.
" 9.	"	Motion filed.
Dec. 29.	"	Set for January 5, 1895.

1895.

Feb. 2.	"	Argued and submitted.
Mar. 23.	"	Overruled, exception; defendants given ten days to answer.
June 18.		Cause on calendar and default of all defendants entered.
" 29.		Motion to set aside default filed.
Sep. 7.	"	Set for September 14, 1895.
" 14.	"	Heard and overruled.

Respondent was in a position to insist upon the defects aforesaid being supplied by appellants. But it is conceded that these defects can be supplied, and, inasmuch as our decision is in favor of respondent, we will treat the appeal as if there were no such defects in the record.

Appellants' first objection is that the court erred in not setting aside the default. Even excluding any consideration of the counter affidavit filed by respondent, no sufficient excuse is shown by appellants for their neglect to file an answer. The

answer should have been filed before April 3, 1895, but it might have been filed at any time from April 2 to June 18, 1895. For a period of almost three months, appellants neglected to file their answer. Strong, indeed, would have to be a showing justifying such neglect. Courts, in the transaction of business, cannot be expected to consult the convenience of litigants, and wait upon the private business affairs of counsel. It is urged that the lower court had no right to take into consideration the counter affidavit of respondent on the motion to set aside the default, and in support of this contention counsel for appellants cites *Gracier v. Weir*, 45 Cal. 54, and *Francis v. Cox*, 33 Cal. 323. This counter affidavit contradicted only the facts relied upon to excuse appellants' negligence, and in no manner the facts set up in the answer tendered as a defense to the action on the merits. It would be a strange doctrine to hold that a trial court could not pass upon the truth of an affidavit filed simply and for the sole purpose of excusing neglect. Counsel misapprehends the authorities he cites on this proposition. They simply enunciate a rule of law that, in passing upon a motion by a defendant to set aside a default, affidavits will not be entertained to contradict alleged facts which, if true, would constitute a defense on the merits.

Again, it is urged as a ground for reversal "that the judgment was taken by default, without any proper application to the court for the relief demanded in the complaint; the same having simply been ordered on a motion of counsel for plaintiff, without proof and without findings." Our attention has been called to no section of the statutes requiring a different application from the one apparently made, or proof or findings upon a default where the defendant has been personally served or has appeared. But, whatever the rule, neither from the recitals in the judgment in this transcript, nor from anything else therein, can we infer or assume that the lower court did not comply with the law.

Another objection urged is that the judgment is a joint one, and entered against one not a party to the suit, namely the "Union Pacific System." The action was instituted against

certain persons in their representative capacities as receivers of certain railroad corporations, which are alleged in the complaint to have constituted the Union Pacific System. It is against such persons, and not the railroad companies of which said persons were receivers. Appellants virtually admit, in this particular connection, that the judgment would be valid as to such persons in their representative capacities as receivers, if the Union Pacific System was not bound therein as a party. Under the phrase "Union Pacific System" the railroads constituting said system would not be bound by the judgment.

Appellants ask us to consider the summons. But this we cannot do. Whatever defects there are in the summons and the return thereon, they were waived when the defendants appeared and demurred to the original complaint.

The objection that the complaint does not support the judgment is untenable. The first count is for a breach of contract. It is sufficient to support the judgment. The second count sounds, in one view of it, in conversion; and appellants insist that it does not state a cause of action, because it fails to aver any ownership of the calves in plaintiff. It, however, expressly alleges a contract between the plaintiff and appellants for the transportation of the calves, and a breach thereof. It may be defective or ambiguous, but not radically so. The third count is also sufficient.

We cannot consider the answer tendered on the motion to set aside the default. The judgment is affirmed, and appellants must pay the costs of this appeal. The cause is remanded, however, with directions to the lower court to strike from the judgment the language making the Union Pacific System a party thereto.

HUNT, J., concurs. PEMBERTON, C. J., not sitting.

MONTANA MINING CO., RESPONDENT, v. ST. LOUIS
MINING & MILLING CO. ET AL., APPELLANTS.

19 313
23 318

[Submitted March 1, 1897. Decided March 22, 1897.]

Injunction Bond—Parties—Pleading—Jurisdiction.

ACTION ON INJUNCTION BOND.—In an action for debt on an injunction bond all of the obligees are necessary parties to the action, the bond being as to them joint and not several.

SAME.—The fact that some of the obligees had no interest in the subject of the suit in which the injunction was granted, does not change the rule.

SAME.—In such an action, it is not necessary to allege a demand upon and refusal to pay by the principal.

SAME—Jurisdiction of State Court.—A state court has jurisdiction of an action on an injunction bond given in a suit brought in a federal court.

Appeal from District Court, Lewis and Clarke County.
H. N. Blake, Judge.

ACTION by the Montana Mining Company, Limited, against the St. Louis Mining & Milling Company of Montana and others. From a judgment for plaintiff entered on an order overruling a demurrer to the complaint, defendants appeal. Reversed.

Statement of the case by the justice delivering the opinion.

This was an action in debt brought by the Montana Mining Company, Limited, as obligee, against the St. Louis Mining & Milling Company of Montana, E. W. Knight and T. H. Kleinschmidt, defendants, as obligors, in an injunction bond dated September 19, 1893, in the penal sum of \$1,000, conditioned for the performance of covenants. The covenant was as follows:

“Now, therefore, we, the undersigned, resident freeholders of the state of Montana, do undertake and promise to the effect that the plaintiff herein will pay to the said defendants so enjoined and restrained as aforesaid such damages, not exceeding one thousand dollars (\$1,000), as such parties

may sustain by reason of the injunction, if the court do finally determine that the plaintiff was not entitled thereto."

The complaint alleges that on September 16, 1893, in an action brought by the defendant the St. Louis Mining & Milling Company of Montana, against this plaintiff, Bayliss, Burrill, Warren, Harvey, Francis, Jewell and Hawkins, the restraining order was duly issued, and on the 20th day of September, 1893, was served upon plaintiff and upon the co-defendants of plaintiff in said action, enjoining them from doing certain mining work upon certain mining claims in the county of Lewis and Clarke, Montana; that upon the issuance of said restraining order the defendant St. Louis Mining & Milling Company made its bond, as required by the restraining order, for the sum of \$1,000, with conditions heretofore recited; that thereafter, on October 3, 1893, the restraining order was set aside in the circuit court of the United States, and it was adjudged that the defendant St. Louis Mining & Milling Company was not entitled to the same, and thereafter the said cause was dismissed in the circuit court and final judgment entered therein. The breach alleged is that plaintiff obligee was obliged to stop work, and was injured and damaged by loss of time and expense necessarily incurred in obtaining a dissolution of said restraining order, and paid out large sums for counsel fees and other expenses. The plaintiff then pleads that the other persons who were named as co-defendants in the action brought by the St. Louis Mining & Milling Company were employees of plaintiff at the time of the issuance and service of said restraining order upon them, and that they did not suffer any damage in consequence of the service upon them of said restraining order, but that all of the damages accruing resulted to this plaintiff, the Montana Mining Company, Limited.

To this complaint the defendants demurred, upon the principal ground that there was a non-joinder of parties defendant; that all the parties to the bond in suit should be made parties to this action; that the bond and the liability of the sureties are subject to the equitable jurisdiction and discretion of the United States court, which cannot be curtailed or administered

in the courts of the state; that there is no breach of conditions of the bond alleged; that the complaint shows that the bond was executed in a suit in equity in the United States circuit court, and that the judgment and discretion of that court have never been exercised so as to fix any liability under said bond upon the parties thereto; and that the facts stated do not constitute a cause of action. The district court overruled defendants' demurrer, and entered judgment that the Montana Mining Company, Limited, have and recover from the defendants, the St. Louis Mining & Milling Company, Knight and Kleinschmidt, the sum of \$1,000, with interest and costs. The defendants appeal from the judgment.

W. W. Dixon, McConnell, Clayberg & Gunn and Toole & Wallace, for Appellants.

Cullen, Day & Cullen, for Respondent.

HUNT, J.—By far the most important point raised by defendants' demurrer is that there is a defect of parties plaintiff, or nonjoinder of parties defendant, to the suit. The contention of the learned counsel for appellants is that all parties to the bond should be made parties to this action. The principal point for decision, therefore, is, were the obligees in the bond necessary parties plaintiff or defendant? We think they were, and that the district court erred in holding otherwise. Respondent concedes the common-law rule to be that, if the demand or cause of action be joint, all the parties, if alive, must join in bringing the action, which should properly be in their names, and not in the name of the company or firm, where it is a company or firm that has the cause of action. (*Armstrong v. Robinson*, 5 Gill & J. 412.) This rule, as applied to an action upon the obligation involved herein, requires all the obligees to join in the suit as plaintiffs, and renders the complaint bad on demurrer. "It must be observed," said Le Grand, C. J., in *Wallis v. Dilley*, 7 Md. 237, which was an action of debt upon an injunction bond, by the obligees against the obligors, "that the cause of action here is joint,

and that, if all the plaintiffs had not united, the declaration would have been subject to demurrer. The obligation is for the payment of one sum to three parties, and they were properly joined as parties." In *Farni v. Tesson*, 1 Black. (U. S.) 309, the bond on which action was brought was a joint undertaking by four persons to pay five others jointly the sum of \$17,000. Two of the obligees were plaintiffs in a judgment which was enjoined, two others were agents or trustees for them, and the fifth was the sheriff who had the execution enjoined. Farni, as the surviving partner of a firm, brought action on the bond in his own name; omitting as plaintiffs three other obligees to whom the bond had been given, and making only two of the four obligors who executed it defendants. To avoid the objection of nonjoinder of the other obligees, plaintiff, Farni, averred that he was the only one interested in the judgment enjoined; that one of the obligees was the sheriff who held the execution enjoined, and the other obligees were the agents or trustees of Tesson. The court, through Grier, J., held that inasmuch as plaintiff sued on a several covenant to pay a sum of money to A, and showed a covenant to pay to A, B and C jointly, he could not recover, and that if, by the condition of the bond, the money to be recovered be not for the joint benefit of all, the suggestion of that fact could not alter the obligation, but would show only that, though all parties to it should join in the suit, thus showing a legal title to recover, the judgment would be for the use of the parties named in the condition and equitably entitled to the money. It cannot be successfully contended that the covenant by the obligors Kleinschmidt and Knight is a several one, to pay any particular part of the whole obligation to any one or more of the obligees. If, as obligors, they covenanted to pay the Montana Company, Limited, \$500, and to each one of the other obligees, say, one-seventh of \$500, doubtless each obligee might sue alone on his several covenant. But the rule laid down by the supreme court of the United States is that stated by Baron Parke, that: "A covenant may be construed to be joint or several according to the interests of the parties appearing upon

the face of the obligation, if the words are capable of such a construction; but it will not be construed to be several by reason of the several interests, if it be expressly joint." Here the covenant of the Montana Company, Limited, and the other obligees is joint on the face of the bond, and there can be no other construction. (*Pearce v. Hitchcock*, 2 N. Y. 388.)

The next suggestion of respondent's counsel, however, is that, if all the obligees named in the bond were joined as plaintiffs, there would be a misjoinder of parties plaintiff, unless the complaint showed that all had an interest in the property upon which the injunction operated. This is not correct, for, on the face of the bond, they are all interested as obligees therein, and all are alike enjoined and restrained. No other construction of the bond, on its face, is permissible. (*Farni v. Tesson*, *supra*.) The obligees' interest was therefore plain, by the bond itself, and presumably all were interested. (Pomeroy on Code Remedies, § 185; Bliss on Code Pl., § 61.) But, say counsel, the Code provision that the suit shall be brought in the name of the real party in interest has changed the common-law rule, and any party shown to have no interest in a recovery sought would be improperly joined. This is true; but, considering what we have said, is the argument correctly invoked in this instance? The action should be brought in the name of the real party in interest, but as the bond, on its face, declared them to be the real parties in interest, in order to ascertain the truth of the matter alleged, that one obligee alone was damaged, it was necessary to join all the obligees as plaintiffs, or make them defendants. The contract was a written one, made with all the obligees. Their legal interest was joint, and, unless some of the exceptions in the statutes applied to excuse their all joining as parties, they must have joined as plaintiffs or have been made defendants. "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but, if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint," etc. (Code of Civil Procedure,

§ 584.) The interest spoken of by this statute cited, according to Pomeroy on Code Remedies (section 185), "is not the interest which will be had in the sum of money or other benefit promised when the agreement is performed, but the interest in the contract,—the legal, technical interest created by the terms of the very agreement." This last statutory provision is mandatory, and must not be confounded with section 580, which permits all persons having an interest in the subject of the action, and in obtaining the relief demanded, to be joined as plaintiffs. (*Loomis v. Brown*, 16 Barb. 330.) These several provisions, the books tell us, are drawn from the old equity practice, but are applicable now in all actions. The statute requiring all who are united in interest to be joined as plaintiffs or defendants is imperative, and, according to Bliss on Code Pleading (section 62), the rule embraces the one recognized in common-law pleading, that joint obligees and those who would enforce a joint right must sue jointly, except as the rule may be modified by the further provision (section 584) that one who has a joint right is authorized to make those defendants who are united with him in interest, but who refuse to unite with him in the action, while the statute allowing all persons to join who have an interest in the subject of the action and in obtaining the relief demanded does not make the joinder imperative. Pomeroy (section 197), in discussing the last two statutes referred to, lays it down that they "do not contemplate nor permit a severance among parties plaintiff when the old law requires a joinder," and that the changes introduced by such provisions rather tend in the opposite direction, by seemingly allowing parties to unite as plaintiffs in many cases where such union was forbidden in legal action. These provisions of our statutes, although enactments of principles established long ago by courts of equity for the regulation of parties plaintiff, are also substantially from the New York codes; where the distinction is clearly recognized between parties who have merely an interest in the subject-matter of the action, and those who are united in interest. "The former may, and the latter must, join as plaintiffs. The former are

proper, the latter necessary parties." (Barb. on Parties, page 351; *McKenzie v. L'Amoureux*, 11 Barb. 516.) And it is this distinction which the appellants press upon our attention. The obligors may therefore insist upon an adjudication of the rights of all the obligees to the bond, if any rights they all have, and that they be made parties; and by the demurrer, on the grounds stated therein, they may avail themselves of this right.

In *Phillips v. Manufacturing Co.*, 88 Ill. 305, which was an action for debt on a bond with conditions, the declaration alleged that the Singer Manufacturing Company was the sole obligee in the bond, whereas the bond showed that Everhard & Harris were joint obligees with that company. It was decided that all the obligees or payees having a legal interest should join in the action upon the instrument. The court says: "Where a bond, upon its face, denotes the parties to it, the action must be between the parties to it, no matter what may be the terms of the defeasance." In *Burns v. Follansbee*, 20 Ill. App. 41, suit was brought by Follansbee and 10 others, as joint obligees, against Burns and Taylor, as obligors, in an injunction bond. The pleas of defense were *non est factum*, *nil debet*, and a traverse of breach. It was decided that the several parties named as obligees or covenantees in the bond should join as plaintiffs, if the covenants ran to them jointly, and if there was nothing appearing on the face of the bond to show that the interest of such obligees or covenantees were several; and furthermore the court held that an obligation like the one in the suit under consideration contained covenants which were joint with all the obligees, and that nothing appeared on the face of the bond to show that the interests of the obligees were several. *Davis v. Wannamaker*, 2 Colo. 637, was a suit in debt on a penal bond. It did not appear that the obligors in the bond covenanted to pay any portion of the penalty of \$10,000 to the defendant in error, or to any of the obligees named therein. Hallet, C. J., for the court, said that there was a defect of parties plaintiff, since there was no undertaking in the bond to pay defendant in error any portion

of the \$10,000; the obligation being to pay that sum to her and 28 others. "Upon such an instrument, it is impossible to say that each of the obligees may maintain a separate action." *McMahon v. Webb*, 52 Miss. 424, was also a suit on an injunction bond by three obligees named therein. Upon an amendment to the declaration one obligee was omitted; the complaint setting forth that he had no interest in the bond, and stating the circumstances showing that he had no interest. It was decided that an action by one obligee could not be supported by the proof of a bond payable jointly to three, nor was it admissible to escape this rule by the mode of declaring here adopted. "This suit should have been by all the obligees," said the court, "or in the name of all for the use of one. O'Hara could not refuse or prevent the use of his name." It will be observed that the principle in this case conforms with that heretofore stated, and supported by other authorities cited, although it would seem, from the opinion of the court, as if there had been no consideration of the power to make an obligee, who should properly have been a plaintiff, a defendant, if he refused to join as a plaintiff. *McLeod v. Scott*, 38 Ark. 72, was an action on a bond executed and payable to Scott and Patterson jointly, plaintiffs in a chancery suit where the injunction was issued. It was there held that the obligees in a bond should be joined as plaintiffs, although the decree in the original chancery suit had adjudged to each of them separate sums.

We are cited by respondents to the following cases: *Alexander v. Jacoby*, 23 Ohio St. 358; *Fowler v. Frisbie*, 37 Cal. 34; *Prader v. Purkett*, 13 Cal. 598; *Browner v. Davis*, 15 Cal. 9; *Lally v. Wise*, 28 Cal. 540, and *Summers v. Farish*, 10 Cal. 347. *Alexander v. Jacoby*, *supra*, seems to have turned upon the point that the attachment bond sued upon, though in form joint, was yet one where the interests of the obligees were several, inasmuch as it appeared that the attachment was levied on the separate property of but two of the obligees, in which the other not joined had no interest. The attachment, as to them, was discharged. The court, in render-

ing the opinion upon the suit on the bond, considered the statutes relating to attachments, and decided that under the Ohio codes, where the order of attachment was wrongfully obtained as against some of the obligees only, a right of action on the undertaking accrued to those obligees as against whom the order was wrongfully obtained, and that it was not necessary for the obligees against whom the order was rightfully obtained to be joined either as plaintiffs or defendants. The opinion is not in harmony with the text of Pomeroy (section 226), but is cited by that author as contrary thereto. Perhaps the case turned on a special statute of the Ohio codes, but, if not, we are constrained to adopt the views of Mr. Pomeroy, as based upon the better principle. *Fowler v. Frisbie, supra*, decided that plaintiffs could maintain a joint action where their interests in the property were not joint and their damages were not joint, and that in such a suit the defendant could show that there was no such joint interest. *Summers v. Farish, supra*, decided that only a party injured could maintain an action on the undertaking, as he was the only party in interest, and a suit in the names of both, united as plaintiffs, was improperly brought, under the codes. Whether the co-obligees should be made defendants, to conclude them was not discussed. *Prader v. Purkett*, also cited, followed *Summers v. Farish*. No point seems to have been made and no discussion had upon the question whether the defendant could insist upon all the obligees being made parties to the action, either as parties plaintiff or defendant. In *Browner v. Davis*, and in *Lally v. Wise, supra*, the court again, without discussion, followed the former decisions, and did not directly consider the case as appellant presents this one. We observe that in several of the California cases the demurrer was only upon the ground of a defect of parties plaintiff, and perhaps the court did not mean to decide that all the obligees must be made parties when defendant raised the point of a nonjoinder of parties defendant. But, notwithstanding some implied views to the contrary in the decisions cited, we cannot overcome the force of the principle upon which appellant here re-

lies, that if the obligors are only liable to the extent of the penalty of the bond, unless all the obligees are made parties to the suit, so as to conclude them, and unless the defect is pointed out by demurrer, where on the face of the bond the liability may exist, the obligees not made parties would yet have an action against the obligors who would still be liable. Hence the plea of a nonjoinder of parties defendant rests upon reason, which authorizes claims under the bond to be adjudicated in one action, as between all parties to it, to the end that all rights may be determined.

The appellants make the point that the complaint should aver a demand upon the principal, and refusal to pay by him, before this suit was brought, and cite *Pinney v. Hershfield*, 1 Mont. 367, to support their contention. What was said in the opinion in that case, to the effect that a demand on the principal debtor in an action on an undertaking on attachment is requisite to found any claim against the guarantor, has been expressly declared to be a dictum, and is contrary to the later decisions of this court applicable to undertakings analogous to the bond before us. (*Nelson v. Donovan*, 16 Mont. 85, 40 Pac. 72; *State v. Biesman*, 12 Mont. 11, 29 Pac. 534.)

The remaining question to be disposed of is the right of the plaintiff to maintain in the state court an action upon an injunction bond given in an action pending in the federal court. An examination of the federal authorities satisfies us that appellants are in error upon this matter. If we grant, for the sake of the proposition involved only, that the court of equity in which the original suit was brought had jurisdiction to assess damages on the injunction bond, we still believe that the state court had power to hear and determine this action. (*Coosaw Min. Co. v. Farmers' Min. Co.* 51 Fed. 107; *Meyers v. Block*, 120 U. S. 206, 7 Sup. Ct. 525.) See also, *Russell v. Farley*, 105 U. S. 433. The judgment is reversed and the cause remanded, with directions to the district court to sustain the demurrer upon the ground first discussed in this opinion.

Reversed and Remanded.

BUCK, J., concurs. PEMBERTON, C. J., not sitting.

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19	544
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AMERICAN SAVINGS AND LOAN ASSOCIATION, AP-
PELLANT, v. BURGHARDT ET AL., RESPONDENTS.

[Submitted March 26, 1897. Decided April 5, 1897.]

Homestead—Mortgage—Acknowledgment by Wife—Abandonment—Liability on Note—Foreclosure—Pleading.

Under section 323, First Division of the Compiled Statutes 1897, a mortgage of a homestead was void unless executed by the husband and wife, and the acknowledgment was an essential part of the execution by the wife.

SAME—Acknowledgment.—Under the laws then in force an acknowledgment of the execution of such a mortgage by a married woman which stated that she "acknowledged the same as her free act and deed," and failed to state that it was made "on examination apart from and without the hearing of her husband," was absolutely void.

SAME.—The abandonment of a homestead does not make valid a past mortgage of the same void *ab initio*.

FORECLOSURE—Pleading.—A complaint which properly alleges the execution and delivery of a promissory note, a default in payment, the giving of a mortgage to secure the same and the breach of the condition upon which foreclosure of the mortgage may be had, does not state two separate causes of action; the money judgment and the decree are different modes of relief for the same wrong.

SAME.—In such an action the plaintiff is entitled to a judgment on the note, although the mortgage given to secure the same is void.

Appeal from District Court, Cascade County. C. H. Benton, Judge.

ACTION by the American Savings & Loan Association against Harry D. Burghardt, Clara E. Burghardt, his wife, and Arthur E. Dickerman to foreclose a mortgage. From a judgment in favor of defendants, plaintiff appeals. Reversed and remanded.

Statement of the case by the justice delivering the opinion.

This is an action brought by the plaintiff to recover judgment for the payment of the following note or instrument: "Great Falls, Montana, December 7th, 1888. \$3,000.00. For value received, on or before nine years from date, I promise to pay to the order of the American Building & Loan Association, at its home office in Minneapolis, Minnesota, the sum of three thousand dollars, with interest at the rate of six

per cent. per annum on the sum of eighteen hundred dollars (\$1,800.00), payable monthly. It is understood that this note is given for a loan obtained on thirty (30) shares of stock of said American Building and Loan Association, and if the maker fails to make any monthly payment on said stock, or to pay any installment of interest for a period of six months after the same is due, then the whole amount of this note shall at once become due and payable. But if the maker hereof shall pay all installments of interest which become due hereon, and all fines and monthly payments which become due on said stock, until such stock becomes fully paid in, and of the value of \$100.00 per share, and before any of said installments of interest or monthly payments shall have been past due for a period of six months, then, upon the surrender of said stock to said association, this note shall be deemed to be fully paid, and canceled. This note is understood to be made with reference to and under the laws of the state of Minnesota. Harry D. Burghardt." This instrument was executed by the defendant Harry D. Burghardt alone. The action was also to foreclose a mortgage executed on the same date as the above instrument by Harry D. Burghardt and his wife, Clara E. Burghardt, to the plaintiff on certain real estate mentioned in said mortgage to secure the payment of said note or instrument in writing. The complaint contains the usual allegations of pleadings in such cases. The answer does not deny the execution and delivery of the note or instrument in writing sued on, but denies the proper execution of the mortgage. It alleges that the real estate mentioned in the mortgage and complaint was at the time of the execution of the mortgage the homestead of the defendants, and alleges further that the said mortgage was not executed in accordance with law. The defect complained of in the execution of the mortgage is alleged to be in the acknowledgment thereto. The acknowledgment is as follows: "Territory of Montana, County of Cascade. Be it known that on this 7th day of December, A. D. 1888, before me personally came Harry D. Burghardt and Clara E. Burghardt, his wife, to me personally known to be the identi-

cal persons described in, and who executed, the foregoing mortgage, and severally acknowledged that they executed the same as their free act and deed." The case was tried to the court without a jury. The court made its findings in favor of defendants, and rendered judgment against the plaintiff for costs. From the judgment the plaintiff appeals.

F. C. Parks, for Appellant.

The court should have given judgment for the amount due on the note, even though the mortgage was void. (*Moors v. Stanlord* (Kan.) 41 Pac. 1064; *Shaver v. Bear River Co.*, 10 Cal. 396.) The mortgage is not void. (*McAdow v. Black*, 4 Mont. 475; *Middle Creek Ditch Co. v. Henry*, 15 Mont. 574, 39 Pac. 1054.) The acknowledgment is substantially correct and that is all that is required. (*Kley v. Geiger*, 4 Wash. St. 484, 30 Pac. 727; *Talbert v. Stewart*, 39 Cal. 602; *Minger v. Baldrige*, (Kan.) 21 Pac. 159.) Upon the abandonment of the homestead, the mortgage became valid. (*Himmelman v. Schmidt*, 23 Cal. 121; *Gee v. Moore*, 14 Cal. 472; *Bowman v. Norton*, 16 Cal. 213; *McQuade v. Whaley*, 31 Cal. 526.)

Stanton & Stanton, for Respondent.

The certificate of acknowledgment is not sufficient and the mortgage is void. (*Danglarde v. Elias*, 80 Cal. 65, 22 Pac. 69; *McLeran v. Benton*, 43 Cal. 467; *Leonis v. Lazzarovich*, 55 Cal. 55; *Livingston v. Kettelle*, 41 Am. Dec. 179, and note; *Wedel v. Herman*, 59 Cal. 507; *Bollinger v. Manning*, 79 Cal. 7, 21 Pac. 375; *Montana National Bank v. Schmidt*, 6 Mont. 610, 13 Pac. 382.)

PEMBERTON, C. J.—The first material question presented by this appeal is as to the validity of the mortgage. It is not disputed that the land in controversy was the homestead of the defendants at the date of the execution of the mortgage. This mortgage was executed and this suit brought under the Com-

piled Statutes of 1887. Section 323, Div. 1, of said statutes provides that a "mortgage or other alienation of such homestead by the owner thereof, if a married man, shall be void, unless the wife join in the execution of the conveyance thereof." The appellant admits that the acknowledgment is not such as is required by law in such cases, but contends that the signature alone of the wife, without any technical acknowledgment, was sufficient to authorize the husband to incumber the homestead with the mortgage. The appellant contends that the acknowledgment by the wife of the mortgagor constitutes no part of the execution thereof. Counsel for appellant relies principally upon the decisions of Wisconsin and other states whose laws on this subject are different from ours. The laws of Wisconsin seem to require only the signature of the wife to the conveyance or mortgage of the homestead. The decisions of courts in other states cited by appellant seem to have been rendered under similar laws to those of Wisconsin. In *Montana National Bank v. Schmidt*, 6 Mont. 610, 13 Pac. 382, this court said: "The homestead can be conveyed only when the wife executes the conveyance by signing and acknowledging that she executes the same freely and voluntarily. The acknowledgment thus becomes an essential part of the execution of a deed by a married woman." To the same effect we cite *McLeran v. Benton*, 43 Cal. 467; *Leonis v. Lazzarovich*, 55 Cal. 55. See, also, authorities cited in note to *Livingston v. Kettelle*, 41 Am. Dec. 170. We think, under the authorities cited, the acknowledgment of the wife under our law of a mortgage of a homestead, is an essential part of the execution thereof, and that, if such acknowledgment is substantially defective, the mortgage is, for that reason, void. This is certainly in accordance with the rule announced in *Montana National Bank v. Schmidt*, *supra*. The acknowledgment of the wife in the case at bar is defective in almost every requirement of the statute. We are therefore, of the opinion that the mortgage sued on in this case is void.

The appellant contends that the defendants abandoned the homestead in question before the bringing of this suit, and for

that reason cannot plead such privilege and exemption to defeat a recovery in this case. Even if it be conceded that the defendants abandoned the homestead premises after the execution of the mortgage thereon, and before suit to foreclose, yet such abandonment did not retroact so as to give validity to the mortgage, which was void from the time of its execution. The mortgage, being void *ab initio*, could not be validated by abandonment. (Waples on Homestead, etc., p. 559.) In *Gleason v. Spray*, 81 Cal. 217, 22 Pac. 551, it is held that a subsequent declaration of abandonment by husband and wife gives no validity to a void mortgage of the homestead. We think the appellant can claim nothing by the abandonment of the defendants after the execution of the mortgage of the homestead, even if the abandonment be conceded.

The appellant contends that it was entitled to a personal judgment against the defendant Harry D. Burghardt for the amount of the note in any event, and assigns the action of the court in dismissing its complaint and rendering judgment in favor of defendants for costs as error. One provision of the note sued on is as follows: "It is understood that this note is given for a loan obtained on thirty (30) shares of stock of said American Building and Loan Association, and if the maker fails to make any monthly payment on said stock, or to pay any installment of interest for a period of six months after the same is due, then the whole amount of this note shall at once become due and payable." The evidence is uncontradicted that the defendant Harry D. Burghardt failed for many months prior to suit to pay the monthly installments called for by the terms of the note. There is no pretense that he was not in default in this respect. By reason of such default, the whole note became due and payable according to the terms thereof. Counsel for the respondents defends the action of the court in this respect; because, he says, there were two causes of action joined in the complaint, to-wit; an action at law on the note, and a suit in equity to foreclose the mortgage; and that, the mortgage having been held to be void, the plaintiff was not entitled to judgment at law on this note. We

think this contention entirely erroneous. In Bliss on Code Pleading this question is fully discussed, and authorities cited. See sections 159 to 171, inclusive. And in section 171, speaking of suits on promissory notes secured by mortgage, the author says: "But the objections to this view are twofold: First. A party usually asks the aid of a court in the exercise of its equitable jurisdiction when, without it, he has no claim for the money or for the specific property which he seeks. The legal demand, so called, does not arise until after the decree of the chancellor. When the mistake in his contract is corrected, when the deed that interferes with his title is set aside, when the constructive trust is declared, then his power to enforce his money or property demand begins. In such case there is but one cause of action, and there can be no separate statement. Second, if the money demand be perfect at first, this objection does not lie; but even then, as in collecting a debt secured by a lien, there is but one cause of action, but one wrong, although two actions may be based upon it. The money demand may be separately prosecuted, and the wrong—the cause of action—is the refusal to pay it; if he seeks to enforce the lien, the plaintiff has the same cause of action, only another remedy, and he will obtain other relief. Formerly this twofold relief was sought in different courts, and by a different mode of procedure—one was called an action at law, and the other a suit in equity; and only by the rule given in section 166 could one have full relief by one action. Under the code there is but one court and one form of action, and, by a single complaint, the aggrieved party may have all the relief to which he is entitled. In seeking what is still called legal and equitable relief, he does not unite different causes of action, for there is but one; he only seeks the twofold relief for the one wrong; therefore there can be no union of causes of action by separate statements. The pleader, in thus seeking full relief, should embody in his one statement all the facts showing the obligation and its breach, to which should be added the facts which show the lien, and he will ask for the double relief; or, if he seeks a money judgment only,

he will stop with the obligation and breach." We think there is but one cause of action stated in the complaint. Under our practice there is but one court, with common-law and equity powers; one form of action; and, if there were several causes of action arising on contract stated in the complaint, it would not be bad on that account, but plaintiff in such case could recover, and ought to be permitted to recover, whatever relief it shows by its evidence it was entitled to under any allegation of the complaint. Our statute and practice are not dissimilar from those discussed by Mr. Bliss. See, also, *Moors v. Sanford* (Kan. App.) 41 Pac. 1064. For this error the cause is remanded, with directions to the district court to set aside the order and judgment appealed from, and to render judgment for the plaintiff against defendant Harry D. Burghardt for the amount of the note sued on.

Reversed and Remanded.

HUNT and BUCK, JJ., concur.

MEYERS, ADMINISTRATOR, RESPONDENT, v. SAVERY,
APPELLANT.

[Submitted March 30, 1897. Decided April 5, 1897.]

Trespass—Permission to Enter.

TRESPASS.—Where it appears from the evidence that the defendant entered upon land and cut and removed hay therefrom under an agreement with plaintiff that he might do so, a verdict against the defendant for trespass should be set aside.

Appeal from District Court, Deer Lodge County. Theodore Brantley, Judge.

TRESPASS by Julia M. Peterson against J. C. Savery. From a judgment for plaintiff, and from an order overruling a motion for new trial, defendant appeals. Pending the appeal, plaintiff died, and J. H. Meyers, her administrator, was substituted in her stead. Reversed.

Statement of the case by the justice delivering the opinion.

Trespass. Plaintiff's intestate sued for damages by reason of defendant's alleged trespass on certain land claimed by plaintiff, and for cutting hay thereon in the years 1889, 1890 and 1891. Defendant denied the allegations of the complaint, and set up the statute of limitations. The court decided that the special plea was well taken in so far as it related to damages alleged for the years 1889 and 1890. Whether defendant was liable for the hay cut in 1891 was the question tried. The jury found for the plaintiff on this issue. Defendant moved for a new trial, which was denied. He appeals from the judgment and order overruling the motion for a new trial. Mrs. Peterson having died since this appeal was taken, J. H. Meyers, administrator, was substituted as plaintiff.

Forbis & Forbis, for Appellant.

W. Trippet and J. H. Meyers, for Respondent.

HUNT, J.—The appellant makes the point that the evidence shows the acts complained of were done with the consent of the plaintiff's intestate, and that, therefore, the verdict of the jury cannot stand. The court instructed that if the jury found from the evidence that the defendant entered upon the land in question by and with the consent of plaintiff, and under such consent, and by and with the permission of plaintiff, cut the hay in dispute, then the plaintiff could not recover, and their verdict should be for the defendant. If, therefore, the evidence does show that the hay cut upon the land was cut with Mrs. Peterson's consent, and that the defendant entered upon the land with the original plaintiff's consent, the appellant's point must be sustained. Now, when we come to look at the evidence, we find that the plaintiff's intestate not only failed in her proof of a trespass, but, by her own witness, established the fact that the entry upon the land in question was made in accordance with her expressed permission and consent. The plaintiff herself testified that she and the de-

fendant had had some quarrel over the right to cut hay upon the land she claimed in 1889, but that in 1890 they adjusted the matter, and cut the hay together; Savery cutting half, and she half. In 1891, the plaintiff testified, Mr. Hawks (who was then employed by Mr. Savery, the superintendent of the Cable Mining Company) went to see her about the cutting of the hay and told her that Savery had written to him to go down and talk with her about cutting hay, and that in response to a statement that she had to have some money, Hawks told her that he would do as well for her as he could, but that he could not pay for the hay until Mr. Savery came down himself, and that she could make an agreement with Savery about it. She also swore that she saw Savery in 1891, and that he told her he would not pay her anything, and that he and she each cut one-half of the hay that year. On cross-examination she said that in 1890 they had had the agreement referred to, whereby each was to cut one-half, but that the third year she and Savery had no arrangement, because Hawks came over, and tried to settle with her, but that Hawks loaned his mower to her that year to cut the hay with. There was other evidence bearing upon the fact that in 1890 Mrs. Peterson and defendant had had an agreement by which it was understood that they would run a line through the ground, and each one cut on his or her side of the line. Plaintiff's last witness was J. D. Hawks, the person referred to in her own testimony. Hawks testified, in substance, that he had had charge of the cutting of the hay in 1889, 1890, and 1891, in accordance with instructions given him by the defendant Savery. On cross-examination Hawks said that in 1890 there was an agreement made between Savery and the plaintiff, and that they drew a line in the field already referred to; that in 1891 he made an agreement with Mrs. Peterson, in pursuance of which agreement they drew a line, and the Cable company was to cut on one side thereof, and Mrs. Peterson on the other; that the hay, in 1891, was cut by the direction of Savery, and that the only agreement between the plaintiff and the witness in behalf of Savery was that they (the Cable company) would cut on one side of the

line in the field, and she would cut on the other; that there was no agreement about paying for the hay, although plaintiff wished the witness to sign some paper, but he would not do so; that it was agreeable to Mrs. Peterson that the witness should cut the hay in 1891; and that the agreement entered into was before the hay was cut, and was made to settle the differences between them, so that the hay could be cut, as the right to cut it was in dispute, and both parties claimed it, but that there was no agreement made with the plaintiff about payment to her; that in that year witness loaned to plaintiff a mower to cut hay with on her side of the line.

It will be observed that the plaintiff nowhere testified directly that an agreement was made, or denied that one was not made, with Hawks, as testified to by Hawks; but she does say that Savery cut one-half of the hay, and that she cut the other half. It is true, she states that there was no arrangement in 1891 with Savery, but she tells of the visit of Hawks to her, whereat they talked about cutting the hay, and that Hawks that year loaned her his mower. When the plaintiff was recalled on the trial, and testified that she knew nothing about the Cable company cutting hay (of which company Savery was superintendent, it appears), she said that she and Savery had quarreled about a settlement, and that Savery had agreed to pay her for the hay "if he won the case." There was also at that interview between plaintiff and defendant a question as to which one was granting the privilege of cutting the hay to the other, Savery saying, "I will let you cut it," while the plaintiff said, "I will let you cut;" and thereupon Savery loaned plaintiff the mower wherewith she cut the hay. When we consider the entire evidence of the plaintiff herein, in connection with the positive and uncontradicted statements of her own witness Hawks that there was an arrangement by which she permitted him to cut the hay in 1891, it seems to us clear that the hay cut in 1891 and the entry upon the land were by the consent of plaintiff.

The respondent suggests in the brief of her counsel that it is apparent that the defendant intended to take the hay at all hazards and in any event, and that, if there was any agree-

ment, it was a forced one as to the division of the ground. But we think this argument is wholly unwarranted by the testimony, which shows, as said before, a voluntary acquiescence and agreement by plaintiff with Hawks for his principal, whereby each cut the hay on his or her respective sides of the line agreed upon. Our conclusion is that the verdict was against the evidence and instructions of the court, and that a new trial ought to have been granted.

The further point raised by the appellant, that the evidence shows that the acts of Hawks and Savery were those of the Cable company is immaterial, for whether the acts done were those of the Cable company or of Savery is unimportant, under the view we take of the evidence. The judgment is reversed, and the cause remanded, with directions to the district court to grant a new trial.

Reversed and Remanded.

PEMBERTON, C. J., and BUCK, J., concur.

McINTYRE, APPELLANT, v. McCABE, RESPONDENT.

[Submitted March 30, 1897. Decided April 5, 1897.]

Claim and Delivery—Evidence—New Trial.

In an action to recover a horse, which defendant claimed to have bought from "H," the bill of sale to "H" containing a description of the horse is hearsay evidence as to defendant and upon his objection was properly excluded.

NEW TRIAL.—Where the evidence is conflicting, an order denying a motion for a new trial will be sustained.

Appeal from District Court, Silver Bow County. J. J. McHatton, Judge.

ACTION by A. G. McIntyre against Peter McCabe. From a judgment for defendant, and from an order denying a motion for new trial, plaintiff appeals. Affirmed.

John Lindsay and Clinton & Lamb, for Appellant.

O. M. Hall, for Respondent.

BUCK, J.—This was an action to recover possession of a horse. Respondent (defendant below) claimed that he had obtained the horse from one Holbrook. Holbrook testified on the witness stand that the horse in defendant's possession was not the same animal he had sold him. To corroborate Holbrook's description of the horse he had sold to defendant, appellant (plaintiff below) offered in evidence a bill of sale from one Pollinger to Holbrook of the horse, which, according to Holbrook, he had originally bought from Pollinger, and subsequently sold to defendant. The court sustained an objection to the introduction in evidence of the bill of sale on the ground that it was immaterial. This ruling was correct. The description of the horse by Pollinger in the bill of sale was merely hearsay, so far as the defendant was concerned, and wholly immaterial. It is urged that the evidence was insufficient to support the verdict. The record shows there was a conflict in the evidence at the trial. The verdict must stand. The order denying the motion for a new trial and the judgment are affirmed.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

MAUL, APPELLANT, v. SCHULTZ ET AL., RESPONDENT.

[Submitted March 28, 1897. Decided April 5, 1897.]

Lease—Modification—Annulment—Evidence—Estoppel.

LEASE—Modification—Annulment.—Plaintiff sought to recover for the reasonable value of the use of premises; defendant pleaded a written lease and modification thereof; in the replication, plaintiff denied the modification and alleged the annulment of the lease. *Held*, that upon the evidence, it appears that the lease was modified and not annulled.

SAME—Evidence—Estoppel.—Where plaintiff sues to recover the reasonable value of the use of premises, and proves a written lease and an oral modification thereof, he is estopped from objecting to evidence proving the modification of the lease by way of reduction of rent.

Appeal from District Court, Silver Bow County. William O. Speer, Judge.

ACTION by Charles Maul against Carl Schultz and Mary Schultz to recover rent. From a judgment for a smaller amount than that claimed, and from an order denying a new trial, plaintiff appeals. Affirmed.

Statement of the case by the justice delivering the opinion.

This was an action by plaintiff and appellant, Maul, against the defendants, to recover \$647 for the use of certain premises occupied by the defendants as tenants of plaintiff from November 20, 1893, until February 10, 1894, and also to recover the sum of \$75 upon an account alleged to be due by defendants to one Berghold for labor, which said account was by said Berghold sold and assigned to this plaintiff. The defendants filed separate answers. In the answer of Carl Schultz it is admitted that he occupied the premises during the time mentioned in the complaint, but denied that the premises were reasonably worth \$647, or any greater sum than \$200 per month during the time they were so occupied. The defendant then pleaded a payment of rent up to December 20, 1893, and admitted the debt for rent from that time until February 10, 1894 at a monthly rental of \$200, amounting to

\$333.33, but that the said sum of \$333.33 was subject to certain offsets. For further defense the defendant alleged that about February 20, 1893, he entered into a written lease with the plaintiff for the premises involved for the term of two years from February 20, 1893, for \$8,400, payable in monthly installments of \$350 per month during the term of the lease; that in pursuance of said lease he took possession and remained therein until about October 27, 1893, when, by mutual consent, the rent was reduced from \$350 to \$200 per month, but that all other terms and conditions expressed in the lease remained and continued in force, as the contract between the parties; that in pursuance of said modification and reduction of rent the defendant paid and the plaintiff accepted \$200 per month in full payment for the rent for the months of November and December, 1893; that on December 14, 1893, the plaintiff served notice on defendant to quit, which defendant refused to do, and continued in the premises until February 10, 1894; that plaintiff also served notices on one J. R. —, and on Mary Schultz, ordering them to vacate, and that they were subtenants of part of said premises under defendant, and that in consequence of said notices the subtenants vacated the premises, and for want of other tenants the defendant was compelled and did surrender up the premises to plaintiff on February 10, 1894; that prior to the serving of said notices on the subtenants and their vacating, defendant was receiving \$300 per month for rent, and would have continued to receive that amount during the continuance of the lease, had it not been for the plaintiff's act in demanding possession of the premises from the defendant and his subtenants. Defendant claimed damages by reason of said acts of plaintiff in the sum of \$1,366. For further defense defendant alleged that by the terms of the lease mentioned plaintiff was to pay for repairs and breakages in water pipes, and for defects that might occur in the roof of the building; and that by reason of the negligence of the plaintiff to comply with the terms of the lease he was obliged to pay out \$23 on plaintiff's account. As to the second cause of action defendant denied any indebtedness to

Berghold. The defendant Mary Schultz, by her answer, denied that she occupied the premises by permission of plaintiff as his tenant, and for an affirmative defense she pleaded that she occupied the premises as an undertenant of Carl Schultz. She also denied any indebtedness to Berghold, but alleged that Berghold was justly indebted to her in the sum of \$23 for goods and merchandise. The plaintiff, by replication, denied any modification in the contract of lease, but alleged the fact to be that on October 27, 1893, the lease originally made between the parties was wholly annulled, and that from that time plaintiff recognized the defendants, Carl and Mary Schultz, as joint tenants, and that they occupied the same jointly as his tenants from month to month, and that for the month commencing October 20, 1893, and ending November 20, 1893, defendants occupied the premises as tenants of plaintiff at the agreed rental for said month in the sum of \$200. Plaintiff denied that the copy of the lease made part of the answer of Carl Schultz was a true copy of the agreement between plaintiff and defendants. The plaintiff denied that defendants fully paid the rent up to December 20, 1893, but alleged that the defendants, Carl and Mary Schultz, as tenants of plaintiff, paid rent for the month commencing November 20, 1893, and ending December 20, 1893, in the sum of \$135, and no more, and that the defendants refused to pay the rent of \$200 for the month commencing November 20, 1893, and that thereupon plaintiff, on February 2, 1894, served on each of the defendants a demand in writing for the possession of the premises. Plaintiff denied that there were any subtenants as alleged. and denied all damage. In a separate reply to the answer of Mary Schultz, plaintiff denied that she was the tenant of Carl Schultz, and that Berghold was indebted to her in any sum. The case was tried to a jury. A verdict was returned in favor of plaintiff and against Carl Schultz for \$398.33, and against Mary Schultz for the sum of \$31.75. A motion for a new trial was made and overruled. Plaintiff appeals from the judgment rendered on the verdict, and from the order overruling his motion for a new trial.

F. T. McBride and *John T. Baldwin*, for Appellant.

S. De Wolfe, for Respondent.

HUNT, J.—The record discloses that this case was bitterly contested on both sides. Scarcely any material testimony was offered without objection. Error is assigned upon many of the rulings of the court thereon, and upon the instructions given to the jury. As we understand the position of the parties, it is substantially this: Plaintiff sued for the reasonable value of the use of the premises occupied by the defendants. The defendant Carl Schultz set up a written lease by plaintiff with him alone for two years, with over a year still to run, and contended that the lease had been modified by parol agreement by a reduction of the monthly rent, and that he owed plaintiff nothing. Plaintiff, by replication, admitted that a written lease had been made with Carl Schultz, but averred that, instead of there having been a modification of it, there had been a complete annulment of said lease, and that a new agreement had been made between himself and both defendants, whereby both Mr. and Mrs. Schultz became his joint tenants at the agreed rental of \$200 per month from October 20, 1893. Plaintiff does not seek to collect more than \$200 per month, and is not attempting to do this under any written agreement. His effort is to hold both defendants as tenants from month to month without looking to Mr. Schultz alone under the written lease; and, as defendants depend upon the written lease as modified, the case involves the first material inquiry whether there was any annulment at all of the written lease. If there was, then the further question of the alleged joint tenancy of defendant becomes important; while, if there was not, Mrs. Schultz's relation to plaintiff may be eliminated and it is only necessary to ascertain the attitudes of the other respective parties under the defendants' contention of the alleged modification of the written lease between plaintiff and Carl Schultz.

For the purpose of proving that there was an annulment of the lease, plaintiff offered evidence to the effect that about No-

venber 7, 1893, Maul and both defendants had some conversation about repairing water and closet pipes, Maul saying that they (meaning defendants) should keep them in repair. Inasmuch as the written lease between plaintiff and Carl Schultz provided that the lessor should pay for any repairs or breakages in the water pipes, appellant argues that this uncontradicted testimony is proof of an annulment of the lease. But, in view of the other statements made by the same witness who testified as above, and of the testimony of plaintiff's other witnesses, we think there is no substantial evidence tending to prove any rescission of the lease between the parties to it. The same witness just referred to said that he was introduced to the defendants by Maul, the owner of the premises, in the beginning of November, 1893, as the new rent collector, whereupon Mr. Schultz said he did not care who collected the rent. Maul thereupon said: "These people (referring to the defendants) will pay you \$200 on the 20th of every month in advance." It is a fair inference from the testimony that the remark of defendant Carl Schultz that he did not care who collected the rent was simply meant to be a statement to the plaintiff that it was immaterial to him to what individual he paid moneys due to the plaintiff under the lease. The witness also said that, although they had some conversation such as has been given concerning the repair of water pipes, they made no agreement with reference to them. A witness named Hirbour, who was called by the plaintiff, testified that he executed the written lease as the agent of plaintiff, and had acted as his agent for 15 years before he turned over his agency, about November 20, 1893, and that within his knowledge there was a verbal modification of the written lease, by which, instead of charging Dr. Schultz \$350 a month rent, as called for by the lease, he only charged him \$250 a month, and that this agreement was made at the time of the last payment to the witness, which was by a check on November 20, 1893. Another witness (Collins), who was a partner of the witness Yaeger in the agency for the collection of rents due to plaintiff, testified that the new arrangement made with Dr. Schultz

or the Schultz firm pertained to the reduction of the rent to a certain amount, and that the instructions to the witness and his partner were to collect \$200 a month as rent for the building. Taking all this testimony together, we are clearly of the opinion that the plaintiff failed to prove any rescission or modification of the contract of lease except as to the single item of reduction of rent. It was, therefore, error for the court to submit the question of the alleged rescission of the lease to the jury at all, and it follows that the question of any alleged joint tenancy of both defendants became immaterial to the case.

The jury, by their verdict, however, rejected the theory of an annulment, and plainly sustained the defense set up by the defendants as to the reduction of the rent or modification of the lease. It must be remembered that the plaintiff objected to all evidence tending to show a modification of the lease upon the ground that no such evidence was admissible under the statute of frauds (Compiled Statutes of 1887, page 652, § 219), which provides that: "Every contract for the leasing for the longer term than one year, or for the sale of any lands, or interest in lands, shall be void unless the contract, or some note or memorandum thereof expressing the consideration, be in writing, and be subscribed by the party by whom the lease or sale is to be made." But is the plaintiff in a position to complain of the error of the court? We think not. He sued for reasonable value, and by his own evidence proved that a written lease existed between himself and Carl Schultz. His theory was erroneous, yet he was awarded a verdict against his lessee, based upon the written lease which was the contract he himself proved on the trial, but which he proved had been modified as to monthly rent due thereunder. Conceding that a written lease with over a year yet to run cannot be modified by parol agreement, we nevertheless think plaintiff cannot raise that question in this case. He never asked for the amount of the rent under the lease, and upon a motion for a nonsuit would doubtless have been properly dismissed from court. Yet he tried his case, and recovered all he was en-

titled to under his own evidence, and from the only person who owed him anything. He cannot be permitted to mend his hold after litigation has begun, change his ground, and upon new aspects of the case shift his position from that taken and relied on before the court. (*Newell v. Meyendorff*, 9 Mont. 254, 23 Pac. 333; *Newell v. Nicholson*, 17 Mont. 389, 43 Pac. 180.) Plaintiff has no right to recover except as against Carl Schultz for rent due. Accordingly, he is in no position to have a verdict in his favor set aside. We, therefore, think that his rights have not been prejudiced, and that his verdict against Carl Schultz must stand.

No point is made by appellant against the justice of the award against both defendants upon the amount found to be due upon an account owing by defendants to one Berghold, and by Berghold assigned to plaintiff. The judgment is affirmed.

Affirmed.

BUCK, J., concurs. PEMBERTON, C. J., not sitting.

CASEY ET AL., APPELLANTS, v. THIEVIEGE ET AL.,
RESPONDENTS.

19	341
21	433
19	341
137	154

[Submitted March 23, 1897. Decided April 5, 1897.]

Placer Mines—Known Veins—Burden of Proof—Evidence.

The expression "known veins or lodes" used in section 2333, United States Revised Statutes, includes such veins only as are clearly ascertained and of such a character as to render the land more valuable on that account and to justify exploitation.

SAME—Burden of Proof.—One who claims a quartz lode mining claim which is included in the boundaries of a patented placer claim, has the burden of proving that the vein was a "known vein" when application was made for the placer patent.

SAME—Evidence.—The facts given in evidence must prevail over the conclusion which the witnesses incorrectly draw from the facts; the conclusion is more of a question of law.

SAME.—Accordingly, where the facts in evidence are merely that the witnesses had found, prior to the application for the placer patent, streaks of quartz, croppings that indicated the existence of leads and, under these croppings, veins between granite walls and, in their opinion, carrying silver, the location of a mining claim on one of

these veins and partly within the placer claim, and the abandonment of the same because of the expense of working it—and where no assay or other means had been tried to determine whether or not the vein carried any ore of marketable value—*Held*, that the evidence did not justify the finding of the jury that the “veins” were “known veins or lodes” within the meaning of section 2333.

Appeal from District Court, Silver Bow County. J. J. McHatton, Judge.

ACTION by George H. Casey and others against Theophile Thieviege and others. Judgment for defendants, and plaintiffs appeal. Reversed.

Statement of the case by the justice delivering the opinion.

Appellants (plaintiffs below) brought an action in ejectment against 73 defendants to recover possession of certain land lying within the limits of Butte City, Montana. A judgment was recovered against all of said defendants except the respondents in this appeal. The facts are substantially as follows: The grantor of plaintiffs, one Black, filed an application in the proper United States land office for a patent to a certain placer claim, about four acres in area, on June 20, 1879. The patent was issued for said tract, known as the “Black Placer,” on November 9, 1891. During some 12 years prior to said application the said land had been worked as a placer mine by different parties. Certain of these parties testified in behalf of respondents that in digging and sluicing the Black placer for gold, as was usual in respect to other placer grounds in the vicinity, they had frequently encountered strata and streaks of quartz, had observed croppings on its surface indicating the existence of quartz leads, and that under these croppings, between walls of granite on bedrock, veins of quartz had been exposed, bearing, in their opinion, silver and other precious metals; that three such veins, as the surface was stripped off here and there in the course of their placer mining, could be plainly traced across said tract, and were readily observable by means of the croppings aforesaid, and at the points of the bedrock exposure aforesaid, both prior to and after the date of the application of Black for his patent.

One of the witnesses testified that he had sunk on some of these leads on the Black placer that "played out," and that he did not know at the time that there were quartz leads of any value on the ground. Another witness testified that when one of these three traceable leads had been exposed on bedrock, it was three or four feet wide, and his partner thought it "a favorable prospect, and wanted to locate it, and asked his advice." He told him "that they had a hundred locations too many" already. The ground prior to 1878 was generally regarded as valuable for placer mining only, according to the placer miner who testified as to value. No assays were made during the placer mining days. On April 20, 1878, one Hirbour and one Hume located a quartz lead, and called it the "Leo." This claim included a large portion of the Black placer. The discovery shaft of the Leo was 40 to 50 feet west of the Black placer line, and the lead on which the discovery was claimed to have been made was, in the opinion of certain witnesses, one of the three traceable veins testified to as extending through said Black placer. The first year Hirbour and Hume, according to the former's testimony, sunk their discovery shaft to a depth of 18 or 20 feet. The second year Hume did the representation work on the Leo in the fall of 1879. Hirbour also testified that in 1878 or 1879 he himself or Hume sunk a shaft on the Leo within the Black placer limits, which was about 6 feet by 4 feet, and 10 feet deep, and that there was exposed therein a vein of silver bearing quartz from which he (Hirbour) took a few pounds of ore. Subsequently, however, Hirbour modified this testimony by stating that he could not swear that the last-mentioned shaft was within the boundaries of the Black placer. The Leo was represented for two years only; \$200 of work alone being expended in its representation. Then Hirbour and Hume abandoned the claim, because of difficulty and expense in working it. In the fall of 1879, one Largey relocated the Leo claim as the "Montana Central" quartz claim. Largey testified that in a shaft of the Leo, which was about eight or nine feet deep, he found what he designates as a "blind lead," and

that this was the discovery on which he based his location. He testified that the lead he discovered was below, and detached from, the croppings which induced him to prospect the said vein. These croppings ran into the Black placer ground. Largey also stated that he had done considerable work on the Montana Central, having represented it for a number of years, and in the course of it had sunk shafts within the Black placer; and that in sinking these shafts he had found quartz, but no lead with well defined walls. He also testified that the surface of the Black placer was covered with debris from the old placer diggings, and that the bedrock was visible in very few places. Largey had instituted a contest in the United States land office with the owners of the Black placer, which resulted in a compromise, whereby the owners of the Black placer were to give him (Largey) a portion of their ground, and in exchange therefor he was to give them a portion of the Montana Central ground. On January 4, 1887, the Blue Dick quartz lode, was located by certain of the respondents. It embraced a large portion of the Black placer ground. The vein of the Blue Dick was one of the three traceable leads testified to as crossing the Black placer. The discovery shaft on the Blue Dick, according to the testimony of the locators, was about 40 or 60 feet deep. In this shaft was found a vein of quartz containing silver, and also native copper. Two assays were made of specimens of ore taken from this discovery shaft at about the time of its discovery, January 4, 1887, one of which ran 29 ounces in silver to the ton, and the other 11 ounces to the ton. It does not appear that it had been worked with the end in view of extracting ore from it. At the time of the institution of this suit the Black placer presented a different appearance from the one it wore in the days of placer mining. Sawdust from a wood yard had been thrown about; some dwelling houses and cabins had been built upon it; and, although the croppings still remained in places, much of the exposed bedrock had been covered again. The Black placer adjoined the original townsite of Butte City. In their complaint, plaintiffs asked as damages the rental values of the

premises. The following special questions, by request of defendants, were submitted to the jury, each of which was answered in the affirmative: First. "Was there, at any time before the 20th of June, 1879, a vein, lead, or lode of quartz or other rock in place bearing any gold, silver, lead, tin or copper whatsoever, known to any person or persons to exist, within the boundaries of the placer claim and ground in controversy in this action?" Second. "If such vein, lead or lode did exist, could its existence have been ascertained before the 20th day of June, 1879, by Leander M. Black, the applicant for the patent introduced in evidence in this action, or by any other person or persons examining the said ground in dispute with an honest endeavor to learn or ascertain if it contained any such veins or lodes?" The jury also found a general verdict against plaintiffs, and answered two other questions submitted adversely to them. Plaintiffs appeal from the order of the district court denying a motion for a new trial, and from the judgment rendered on the verdict and special findings.

F. T. McBride, for Appellants.

Thompson Campbell, J. T. Baldwin and W. I. Lippincott, for Respondents.

BUCK, J.—This case is the result of a conflict between a placer patent and a quartz lode location made subsequent to the application for the placer patent. In investigating the questions involved, we accord full force and effect to the general rule that, where there is a conflict in evidence on a trial, the verdict should not be disturbed on appeal. The verdict in this case, then, must be sustained, if there is competent evidence to support it. We must accept as proven the fact that, at the time the application was made for a patent to the Black placer claim, its surface indicated veins of mineral bearing rock in place. It is true that witnesses on behalf of respondents testified positively that such veins or lodes were in the claim, and plainly visible as veins or lodes at the time of such

application. But, inasmuch as these witnesses gave in detail the facts on which they based this assertion, these facts, and not the mere assertion based thereon, however positively made, should be considered. The assertion was in the nature of a legal conclusion, being only the expression of an opinion. Hence in what we deem proven by respondents we do not go to any greater extent than to concede that they showed in evidence that the surface appearance of the Black placer, at the date of the application for patent, indicated by croppings and in exposed bedrock the existence of lodes or veins of mineral bearing rock in place.

From the questions submitted to the jury and the argument of their counsel in this court, it would seem that respondents contend for this proposition of law, namely: that when an application for a placer patent is made, any lode or vein of quartz or other rock in place containing any gold, silver, lead, tin or copper whatsoever, known to exist within the boundaries of the claim (or the knowledge of whose existence could be ascertained by one examining the ground in an honest endeavor to acquire such knowledge), is excepted by section 2333, Revised Statutes of the United States, from a patent issued on such application. If this is the law, the determination of this appeal might be attended with more difficulty than it is; for it also appears from the evidence herein—admitted without objection—that some years after the application for a patent for the Black placer claim, in the discovery shaft of the Blue Dick quartz lode claim, sunk on one of the three so-called “traceable veins” crossing the Black placer at the time of application for its patent, a vein of ore was found carrying as much as 29 ounces of silver to the ton, as shown by one of the two assays made. But we cannot agree with the proposition that this is the law. It virtually eliminates from the question of what is the vein or lode known to exist, the elements of value, character and extent of the existing vein or lode. In *Migeon v. Railway Co.*, 23 C. C. A. 163, 77 Fed. 256, Judge Hawley, speaking for the United States circuit court of appeals, says: “This section (2333) of the statute

was primarily intended for the benefit and protection of the locators of placer claims. If a lode is known to exist within the boundaries of a placer claim, the applicant for a patent must state that fact, and then, by paying \$5 an acre for that portion of the ground and \$2.50 for the balance, a patent will issue to him, covering both the lode and placer ground; but, if the lode is known to exist, and is not included in the application for a patent, then it will be construed as a conclusive declaration that the owner of the placer claim has no right of possession by virtue of his patent for the placer ground to the vein or lode. It matters not whether there is a lode or vein actually within the limits, which subsequent developments may prove; if it is not known to exist at the time of the application, the patent for the placer claim will include such lode or vein. In such cases the supreme court has repeatedly declared that it is not enough that there may have been some indications, by outcropping on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other precious metals, to justify their designation as 'known veins or lodes;' that in order to meet that designation, the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation. (*Iron Silver Mining Co. v. Reynolds*, 124 U. S. 374, 383, 8 Sup. Ct. 598, 603; *U. S. v. Iron Silver Mining Co.*, 128 U. S. 674, 683, 9 Sup. Ct. 195, 199; *Iron Silver Mining Co. v. Mike & Starr Gold & Silver Mining Co.*, 143 U. S. 394, 404, 424, 12 Sup. Ct. 543, 545, 553; *Sullivan v. Mining Co.*, 143 U. S. 431, 12 Sup. Ct. 555; *Brownfield v. Bier*, 15 Mont. 403, 39 Pac. 461, and other authorities there cited.

"This construction as to the meaning of section 2333 is, in our opinion, founded in reason, and is in harmony with the construction given by the courts to the other sections of the statute relative to the rights of locators of mining claims upon the public lands of the United States. But, in any event, the rule, as above stated, is now too well settled to be departed from." In the case of *Iron Silver Mining Co. v. Mike &*

Starr Gold & Silver Mining Co., 143 U. S. 394, 12 Sup. Ct. 543, cited *supra*, the court says: "It is undoubtedly true that not every crevice in the rocks, nor every outcropping on the surface, which suggests the possibility of mineral, or which may, on subsequent exploration, be found to develop ore of great value, can be adjudged a known vein or lode within the meaning of the statute." And further the court says: "The amount of the ore, the facility of working and reaching it, as well as the product per ton, are all to be considered in determining whether the vein is one which justified exploitation and working." In *Brownfield v. Bier*, 15 Mont. 403, 39 Pac. 461, the *Iron Silver Mining Co. v. Mike & Starr Gold & Silver Mining Co.* case, *supra*, is elaborately discussed. Our supreme court there says: "But in that case the contention within the court seems to us to have been more upon the question of facts in that particular case than upon a view of the law;" and proceeds to quote, as declaratory of the law, language taken from the majority opinion of the court, and also from the dissenting opinion rendered therein by Mr. Justice Field and Associate Justices Harlan and Brown. Certain portions of this language are requoted below.

But the respondents urge, to meet this view entertained by the Montana supreme court of what was held in the *Mike & Starr Gold & Silver Mining Co.* case, that the question of value is one solely for the jury, and the facts in this case are stronger in favor of the verdict than those successfully invoked for the same purpose in the *Mike & Starr Gold & Silver Mining Co.* case. This language is relied upon from the last-named decision to uphold the first contention: "It is, after all, a question of fact for the jury. It cannot be said, as a matter of law, in advance, how much of gold or silver must be found in a vein before it will justify exploitation, and be properly called a 'known' vein."

As to what were the particular facts involved in the *Mike & Starr Gold & Silver Mining Co.* case, the justices of the supreme court of the United States were divided in opinion, and this fact led the supreme court of Montana to use the language

it did in *Brownfield v. Bier*, *supra*. The majority of the justices claimed the record showed that, prior to the application for a patent to the placer claim of the Iron Silver Company, within the limits of said placer a tunnel had been run to the extent of 400 feet; that in said tunnel, about 75 or 80 feet from its mouth, a 15-inch vein of quartz, with distinct walls of porphyry, had been disclosed; and that assays of the ore taken from this vein had been made (apparently at the time it was found), showing that the same was valuable gold producing ore. Speaking of the facts involved, Mr. Justice Brewer, in delivering the opinion for the majority of the court, said: "The placer tract was a small one of fifty-six acres. The tunnel ran 400 feet underneath its surface. At its mouth there was a large dump of earth taken from it. No one had a right to enter that ground as placer-mining ground, unless he had made such an inspection as to enable him to make affidavit that it was adapted to such mining. No examination could have been made without disclosing the existence of this tunnel. That was a fact upon the surface, obvious to the most casual inspection. No one could be heard to say that he had examined that ground in order to ascertain that it was suitable for placer mining, and in such examination had not discovered the existence of this tunnel. It was not a little excavation, with a few shovelfuls of dirt at its entrance. The pile of dirt was evidence which no one could ignore that it was a long tunnel, running far into the earth. It was in mining ground, as all this territory was believed to be, and, therefore, an excavation likely to disclose veins.

"As an applicant for a placer patent was chargeable with notice of the existence of the tunnel, so also was he chargeable with notice of whatever a casual inspection of that tunnel would disclose. He would not be heard to say: 'I did not enter and examine this tunnel, and therefore knew nothing of the veins apparent in it.' The government does not permit a person to thus shut his eyes and buy. If there be a vein or lode within the ground, it is entitled to double price per acre for it and the adjacent fifty feet; and, with such interest in the price

to be paid, it rightfully holds an applicant for a placer patent chargeable with all that would be disclosed by a casual inspection of the surface of the ground, or of such a tunnel. The applicant must be adjudged to have known that which others knew, and which he would have ascertained if he had discharged fairly his duty to the government." But Mr. Justice Field, in the dissenting opinion, says: "It (the tunnel) extended 400 feet, but it disclosed within it only veins of decomposed porphyry and manganese iron. * * * There was no vein or lode of gold or silver bearing rock found in the tunnel, and there is an erroneous impression conveyed by the court (in the majority opinion) in that respect." Proceeding, Justice Field says: "But, as I shall show hereafter, the mere indication or presence of gold or silver is not sufficient to establish the existence of a lode. The mineral must exist in such quantities as to justify expenditure of money for the development of the mine and the extraction of the mineral. It would create surprise among miners to be told that if a trace of loose gold, such as is shown here, was found at any one spot in a tunnel leading to a placer claim, it would establish the existence of a vein or lode in the placer claim, and form the basis of a proceeding to despoil a purchaser from the patentee, years after the purchase, of a large portion of its mining property. * * * An unlocated lode claim, existing only in the impressions and beliefs of neighbors or others, and not in the knowledge founded upon discovery and exploration, does not seem to me to have any element of property or validity, or a basis of defense to proceedings to obtain a patent from the government." As we have said, there were indications of veins in the Black placer at the time of the application for its patent. It is true that what appeared to be veins had been exposed between walls of granite in the bedrock. But not a particle of competent or sufficient evidence was offered by respondents (on whom rested the burden of proof) to establish the fact that these veins had been clearly ascertained, or contained minerals sufficient as to value, quantity, or character to justify exploitation. Even by respondents'

own witnesses these quartz-filled crevices in the granite bedrock of the Black placer (that witnesses designated them positively as veins or lodes, as we have shown, was not sufficient evidence of the fact that they were) had never been explored, or even examined. with a view to prospecting or working them during the placer mining period. They were encountered just as strata seams and quartz filled crevices were usually encountered at the surface and on bedrock in working other placer mines in that vicinity. No serious attempt had been made to prospect or exploit them. A witness who sunk on some of them says "they played out." Another witness dissuaded his partner from locating one of them, which he designates as the "main vein," by suggesting that they had already a hundred locations too many. His partner, this witness says, regarded this vein at the time as a "favorable prospect." Hirbour, the locator of the Leo quartz lode, may possibly have sunk a shaft for a few feet on one of these so-called "traceable veins," but he found practically nothing. He says he took out a few pounds of ore. Largey struck what he calls a "blind lead" in his quartz lode claim, the Montana Central, which was located after the application for the placer patent. He says that at the point where he made his discovery of a blind lead the croppings (which extended from said point into the Black placer ground) were detached from the vein he found, and were only float. He states also that he sunk shafts within the Black placer on these so-called veins or leads, but did not even find as a result any vein with well defined walls. Largey may have been an interested witness, but the respondents put him upon the stand as their own witness, and we cannot find any testimony in the record which substantially contradicts his statements. The fact, of itself, that Largey and the owners of the Black placer were to exchange interests in their grounds by way of compromise, is not competent evidence to establish the value of the Montana Central quartz lode vein for exploitation at the date of the application for the placer patent. At the time of the application for patent, so far as the testimony for respondents shows, the extent and

definite character of the quartz in these crevices in the Black placer were unknown. No assays had been made of the quartz found on bedrock or elsewhere. The ground itself had been worked as a placer mine for years, and, according to all the witnesses who testified on the subject of the value of the quartz therein, was considered valuable for placer mining only. That quartz ore of value was found in the Blue Dick discovery shaft cannot avail respondents. The location of the Blue Dick was made some eight years after the application for the Black placer patent. However, no great amount of work (so far as the record discloses) had ever been performed in exploiting the Blue Dick vein. There was little evidence to show the value or extent of this vein. At the time of the trial of this suit in the lower court its discovery shaft was half full of water. Two of its locators had dwellings and outhouses on the ground before they made the location, and they were conducting a wood business on the premises at the time of the location. One of them had entered into possession of the premises in dispute under a deed from one Upton, who apparently had some kind of a possessory right to the ground. In 1888 one of the respondent defendants received two deeds from these locators, one of which conveyed to him a certain part of the property in dispute (described with reference to the surface area), on which there was a dwelling house, and the other an interest in the Blue Dick. This evidence was insufficient to present a question of fact for the jury under the law applicable.

We reiterate the rule as laid down, after a careful review of the authorities, in *Brownfield v. Bier*, 15 Mont. 403, 39 Pac. 461, that to meet the designation "known" veins or lodes mentioned in section 2333, Revised Statutes of the United States, veins or lodes within the boundaries of a placer claim at the time of the application for a patent therefor, which should be excepted from a patent issued thereon, must, at the time of the said application, have been clearly ascertained, and must have been of such an extent, character, and value as to justify their exploitation. Conceding everything as proven which can in any possible view of the evidence be regarded as

advantageous to respondents, we are still of opinion that they clearly failed to make out their case. It follows that the special findings of the jury did not justify the general verdict and judgment. There was hardly any temptation to Black, when he applied for a patent, to perpetrate a fraud on the government. By paying \$10 more for the four-acre placer, he could have had any quartz leads thereon specifically conveyed to him. Mr. Justice Field, stating the law as to presumptions in favor of government patents, says, in his dissenting opinion in the Mike & Starr Gold & Silver Mining Company case, *supra*: "The presumption in favor of its validity attends the placer patent, as it does all patents of the government of any interest in the public lands which they purport to convey. So potential and efficacious is such presumption that it has been frequently held by this court that if, under any circumstances in the case, the patent might have been rightfully issued, it will be presumed, as against any collateral attack, that such circumstances existed. (*Smelting Company v. Kemp*, 104 U. S. 636, 646.) As was said by the circuit court in the *Eureka Consolidated Mining Company* case, 4 Sawy. 302, Fed. Cas. No. 4,548, a patent for a mining claim is ironclad in its potency against all mere speculative inferences." The tendency of the later decisions of the federal courts is to uphold the presumptions in favor of placer and townsite patents more carefully than appears to have been done in some of the earlier decisions of those courts in conflicts between such patents and subsequently located quartz lodes. This is particularly noticeable in the late case of *Dower v. Richards*, 151 U. S. 658, 14 Sup. Ct. 452. Perhaps one reason for this is the fact that it has not infrequently happened, in cases involving such conflicts, where the ground in dispute lies within an inhabited portion of a town or city, that the courts have been appealed to and compelled to determine them under the rules of law governing mineral locations, while underlying the apparent issue the real source of controversy was the desire to acquire title to land only nominally valuable for mining purposes. Whether this is true or not, however, in all such cases

where persons locate a quartz lode within a placer claim which lies in a town or city, or in a townsite, subsequent to the application for a patent to the one or the other, the evidence as to the existing known lead justifying a decision in favor of the quartz lode claimants should be clear and convincing, and not made up of surmise or mere personal impressions and beliefs. Were this not true, honestly acquired town-lot titles in populous mining towns and cities, based on such patents, would be constantly in jeopardy, and subject to possible attack at any time when, in the digging of a cellar or the foundation for a house, a vein of quartz should be disclosed. The upsetting of vested rights to such realty, years after the patents under which they have been acquired were applied for, should never be encouraged or tolerated when based on frivolous or insufficient grounds. In the enactment of the mineral laws, congress never contemplated any such result.

Respondents pleaded the statute of limitations as against plaintiffs, but, inasmuch as they have themselves abandoned this phase of the case, we need not discuss it. Numerous other errors are assigned, particularly in reference to the instructions given by the lower court. But these also it is unnecessary to pass upon. The judgment is reversed, and the cause remanded, with directions to the district court to grant a new trial.

Reversed and remanded.

HUNT, J., concurs. PEMBERTON, C. J., not sitting.

NATIONAL WALL PAPER COMPANY, APPELLANT, v.
M'PHERSON ET AL., RESPONDENT.

[Submitted April 8, 1897. Decided April 12, 1897.]

Pleadings—Denials—Fraudulent Conveyance.

PLEADINGS—Denials.—An answer which merely denies "each and every allegation of the complaint not herein specifically admitted," does not deny the allegations of fraudulent intent set forth in a complaint in an action to set aside a conveyance on the ground of fraud.

SAME.—Affirmative allegations in the answer may have the same effect as specific denials of the allegations of the complaint, and in such case plaintiff's motion for judgment on the pleadings is properly denied.

N. B. This case was decided under former code of practice.

Appeal from District Court, Gallatin County. Frank K. Armstrong, Judge.

CREDITORS' SUIT by the National Wall Paper Company against L. W. McPherson and Melissa Lewis, executrix of S. W. Lewis, deceased, to set aside conveyances from McPherson to Lewis, as in fraud of creditors. Judgment for defendants, and plaintiff appeals. Affirmed.

Statement of the case by the justice delivering the opinion.

This is an action brought to set aside a deed of assignment of certain personal property and certain conveyances of real property described in the complaint. The complain alleges that on the 20th day of March, 1895, the plaintiff recovered judgment in the district court of Gallatin county against the defendant McPherson, for the sum of \$417.94, with interest and costs; that thereafter an execution was issued on said judgment, and directed to the sheriff of said county, who afterward returned the same wholly unsatisfied; that, at the time of the recovery of such judgment, the defendant McPherson was the owner of a certain stock of goods in the city of Bozeman, alleged to be of the value of \$1,800, and of certain real estate, described in the complaint of the value of \$800.

It is alleged that on the 5th day of April, 1894, the defendant McPherson executed a pretended deed of assignment of said stock of merchandise to defendant Lewis, and that on the same day the said defendant McPherson and his wife executed a deed to said Lewis to the real estate mentioned in the complaint; and on the 7th day of September, 1894, it is alleged that the said McPherson executed to said Lewis another deed to said real estate, which was intended to correct an error in the first deed thereto. The complaint alleges that the deed of assignment of said stock of merchandise and the conveyances of said real estate to Lewis by the defendant McPherson were without consideration, fraudulent, and void, and made for the purpose of hindering and delaying the creditors of the defendant McPherson. Judgment was asked that the same be set aside and vacated, on the ground of fraud in the execution thereof. The answer denies each and every allegation of plaintiff's complaint not therein specifically admitted. It is specifically admitted in the answer that the plaintiff is a corporation; that plaintiff recovered judgment as alleged against the defendant McPherson; and that execution was issued and returned as in said complaint alleged. It is also admitted that, at the time of such recovery of the judgment, defendant McPherson was a merchant and the owner of certain goods, wares, and merchandise in the city of Bozeman, as alleged in said complaint. The answer does not contain any specific denial that the deed of assignment and the conveyances mentioned in the complaint were fraudulent and void, and made for the purpose of hindering and delaying the creditors of defendant McPherson. The answer alleges affirmatively that on the 5th day of April, 1894, the defendant McPherson made an assignment of the stock of goods mentioned in the complaint to the defendant Lewis, in trust for the benefit of his creditors named in said deed of assignment, and that, immediately after the execution of said deed of assignment, Lewis took actual and exclusive possession of said stock of merchandise, and entered upon his duties in accordance with the trust created thereby. It further alleges the value of the goods to

be \$450, and that said Lewis was not able to realize more than \$325 from the sale of said stock of merchandise. The answer then alleges that on the 5th day of April, 1894, at the time of the assignment of said goods to Lewis by McPherson, McPherson was indebted to said Lewis in the sum of \$1,000, with interest, and that, for the purpose of partly paying said sum of \$1,000, the defendant McPherson and his wife conveyed to the defendant Lewis the interest of said McPherson and wife in and to the real estate mentioned in the complaint; that on the date of the conveyance of said real estate, and for a long time prior thereto, the defendants were joint tenants and owners of said real estate, each owning one-half thereof; and that the conveyance aforesaid from McPherson to Lewis conveyed McPherson's one-half interest in said real estate. It is also alleged that said deed of assignment and said conveyances of the real estate were both executed by McPherson to Lewis for the purpose of paying his just debts which were then due and owing to Lewis and others. The plaintiff moved the court for judgment on the pleadings, which said motion was by the court overruled; and the plaintiff was thereupon given ten days in which to elect to stand on his motion or file a reply. The plaintiff thereafter elected to stand on his motion, and declined to reply. The case having been set for trial, and, the plaintiff failing to appear to further prosecute said case, the same was dismissed for want of prosecution, and judgment rendered dismissing the complaint of plaintiff, and for costs, in favor of defendants, from which judgment plaintiff appeals. After judgment in the district court, defendant S. W. Lewis died, and Melissa Lewis was substituted as his executrix.

Cockrill & Pierce, for Appellant.

Luce & Luce, for Respondents.

PEMBERTON, C. J.—The only question presented by this appeal is as to whether the district court erred in refusing to order judgment on the pleadings in favor of the plaintiff. The answer does not specifically deny the allegations of the com-

plaint to the effect that the instruments attacked were fraudulent and made with the intent to hinder and delay the creditors of defendant McPherson. There is a general denial in the answer of all the allegations of the complaint not specifically admitted; but we think this denial alone would not have been sufficient to prevent judgment on the pleadings. After the admissions shown in the statement, the answer sets up affirmatively that the deeds or conveyances attacked for fraud were made for the purpose of securing and paying defendant McPherson's debts then due and owing, and in consideration of such debts. This constitutes the substantial averment of the answer. While it does not specifically deny the allegations of fraud contained in the complaint, the answer sets up affirmatively facts which, if true, constitute a defense. *Tudor v. De Long* (Mont.) 46 Pac. 258, and authorities cited. The facts pleaded affirmatively in the answer are tantamount to, and virtually constitute, a denial of the allegations of the complaint. In *Mauldin v. Ball*, 5 Mont. 96, 1 Pac. 409, a suit brought to recover possession of a mining claim and damages for removing ore therefrom, in which the question of pleading here involved was treated, this court said: "The plaintiffs charge that the ore was taken and extracted from ground owned by them, and this the defendant denies, by alleging that he owns the ground from whence the ore was extracted and taken. No completeness or distinctness would have been added to this issue if the plaintiffs had repeated in their replication what they had averred in their complaint, and alleged again that this ore was taken from the ground owned by them, by denying that it was taken from ground owned by the defendant." We think the affirmative allegations of the answer were, in effect, a substantial denial of the allegations of fraud contained in the complaint; as much so as if it denied specifically every allegation of the complaint in relation thereto. The judgment appealed from is affirmed.

Affirmed.

HUNT and BUCK, JJ., concur.

MATHIAS, RESPONDENT, v. THE WHITE SULPHUR
SPRINGS ASSOCIATION, APPELLANT.

19 359
24 264

[Submitted April 5, 1897. Decided April 12, 1897.]

Corporation—Authority of President.

CORPORATIONS—Authority of President.—The president of a corporation organized to acquire townsites and erect buildings, has no implied authority to act as its managing agent and bind the company by a contract with an architect for building plans.

SAME.—In this case, the evidence did not show that the president was in the active conduct and management of the business of the company, or that he had full control of its business, or was its principal stockholder, or that he had express authority to contract for the plans or buildings to be erected by the company without the sanction of the board of directors, or that he had general authority to act for the board, or that it was his custom to exercise publicly such powers, or that the company led the public to believe that he had such powers or knew of the contract sued upon; and it was held that the mere fact that the president had had repairs done by plaintiff to a building belonging to the company, was not sufficient to justify a finding that he had power to bind the company by the contract sued upon.

Appeal from District Court, Lewis and Clarke County. H. N. Blake, Judge.

ACTION by T. F. Mathias against the White Sulphur Springs Association. From a judgment for plaintiff, and from an order denying a motion for new trial, defendant appeals. Reversed.

Statement of the case by the justice delivering the opinion.

The plaintiff (respondent herein) brought this action against the defendant and appellant corporation for services alleged to have been performed by him, as an architect, in drawing plans for a building for the defendant. The defendant denied any indebtedness. The case was tried to a jury, and judgment rendered against the corporation for \$280.31. The corporation appeals from the judgment and the order denying a motion for a new trial.

N. W. McConnell, John B. Clayberg and M. S. Gunn, for Appellants.

The general rule is that the president cannot act and contract for the corporation any more than any other director. (Cook on Stockholders, § 716; *Wait v. Nashua Etc. Ass'n*, 23 Atl. 77; *Street Railway Co. v. Bank*, 34 S. W. 89; *Turnpike Co. v. Looney*, 71 Am. Dec. 491; *Mill Co. v. Lyndon L., B. & I.*, 25 Am. St. Rep. 783; Vol. 1 Morawetz on Corporations, § 537.)

F. H. McIntire, for Respondent.

The acts of the president of a corporation, done in the management of the business of a corporation, and within the scope and ordinary course of its business, are the acts of the corporation itself. (Thompson on Corporations, Vol. 4, § 4613, note 1 and authorities cited; Beach on Corporations, Vol. 1, § 203; Boone on Corporations, § 144, note 2; Morawetz on Corporations, Vol. 1, § 538; *Sparks v. Dispatch Etc. Co.*, 104 Mo. 539, and authorities cited; *Sherman Center Etc. Co. v. Swigart*, 43 Kan. 282.) Citing also, Lawson's Rights and Remedies, Vol. 1, § 57; Abbott's Trial Evidence, page 41; Thompson on Corporations, Vol. 4, § 4881 and § 5250, *Id.*, §§ 4661-4882.

HUNT, J.—The principal error assigned, and the only one which we need consider, presents the question whether the evidence is sufficient to support the verdict. We will assume that the proof showed that plaintiff prepared the plans for the corporation, and that they were worth the sum charged; but the defense of the company was that there was no evidence that Aaron Hershfield, the president of the corporation, had any authority to contract for the making or furnishing of the plans or for the performance of the services specified in the complaint, or to incur any indebtedness against the defendant on account thereof. The plaintiff himself testified: That in 1892 he did some work, as an architect, for Mr. Hershfield, in the matter of improving or remodeling the White Sulphur Springs Hotel, at White Sulphur Springs, Mont.; that in August or September of that year he drew the plans, the

value of which is sued on, for a business block; that these plans were made for the defendant corporation; that Mr. Hershfield (the president of the corporation) and plaintiff together examined a certain lot at White Sulphur Springs, and that Hershfield told him what the size of the building was to be, and for what purpose it was to be used; that it was to be put on the property of the defendant corporation at White Sulphur Springs; that plaintiff thereafter gave to Hershfield a description of the plans, and subsequently sent his bill for the services to Hershfield, at Helena, demanding payment; that the plans were delivered to Hershfield, who requested that a few changes be made; that this was done, and, when plaintiff went to deliver the plans again to Hershfield, Hershfield was absent, and that, when spoken to afterwards by plaintiff, he told him to keep the plans for the present; that he did not know whether he would build that year or not; and that that was why the plaintiff happened to have the plans himself on the trial, but that they were presented to Hershfield and accepted. This was all the testimony introduced on the trial in behalf of plaintiff relating to the contract with the defendant corporation.

The defendant moved for a nonsuit on the ground, among others, that no authority had been shown from the corporation to Hershfield to contract for drawing the plans. The court overruled the motion for a nonsuit, and, the defendant declining to introduce any testimony, the court instructed the jury, that, if they were satisfied that the plaintiff performed the services described in the complaint at the request of any officer of the defendant, and that officer was acting within the scope of his authority and in the ordinary course of business of the defendant, then plaintiff could recover. But when we analyze the facts testified to by the plaintiff, and apply to them the rules of law bearing upon the liability of a corporation for the acts of its president, we are forced to the conclusion that the district court erred in overruling the defendant's motion for a nonsuit, and in charging the jury as it did. While we are not disposed to adhere too strictly to the view taken by

many learned writers, and stated by Thompson (Thompson on Corporations, § 4619), to be that the president of a corporation has no implied authority, by virtue of his office, to act as agent of the corporation, but must derive his power by delegation of the board of directors; and hence that, wherever his power to bind the corporation is challenged, a delegation of power from the board of directors, either in express terms, or such as may be implied from the habit of acting with their apparent consent, must be shown, yet we shall be careful not to go too far towards the opposing theory, by presuming that one of the implied powers of the office of president of a corporation organized to acquire title to a townsite and buy lands and build buildings, is to act as its managing agent in entering into a contract with an architect to draw plans for an expensive new building for the company. Doubtless, where the president of a corporation makes a contract within the ordinary scope of the business of the corporation, unless notice to the contrary be given, a person dealing with the president may proceed upon the assumption that the president has authority, as the agent of the corporation to bind it. (*Ceeder v. Lumber Co.*, 86 Mich. 541, 49 N. W. 575.) This appears to be the rule in New York, as laid down in *Bank v. Kohner*, 85 N. Y. 189; *Cook on Stock*, Stockh. Corp. Law, § 716.

But the agreement must in some way appear to have been within the scope of the president's authority,—that is, that the act done by the president pertains to the ordinary business of the company,—before, even under most liberal rules, any presumption can arise that the act is legally done and is binding upon the corporation. (*Sparks v. Transfer Co.*, 104 Mo. 531, 15 S. W. 417; *Smith v. Smith*, 62 Ill. 493; *Taylor on Priv. Corp.*, §§ 237, 238.) But in the case before us the circumstances do not show that Hershfield was in the active conduct and management of the business of the defendant corporation, as in the case of *Ceeder v. Lumber Co.*, *supra*, or that he had full control of its business, or was the principal stockholder in the company, as in *Crowley v. Mining Co.*, 55 Cal. 273; or that, as president, Hershfield had express au-

thority to contract for plans or new buildings to be erected without first obtaining the sanction of the board of directors, as in *Siebe v. Machine Works*, 86 Cal. 390, 25 Pac. 14; or that he had general authority to act for the board of trustees; or that it was the president's custom to exercise like powers in the face of the public; or that the company held him out to the public as possessing the power to order plans for new buildings or to contract for the same; or that the corporation, or any director thereof, ever knew of, or received and retained, the plans, or in any manner at all availed itself of the plaintiff's work, or ratified the president's act. The mere circumstance that once before the president had had some repairs or remodeling done by plaintiff upon a building belonging to the company, is not enough to warrant the presumption that he had the power to enter upon this contract. Needed repairs of a building, already built and belonging to the company, may very appropriately be deemed within the ordinary scope of the business of the corporation, pertaining to the best preservation of its property; but the right of contracting for plans for a valuable new building is a step in the acquisition of new property, which is an entirely different matter, and one upon which the board could alone ordinarily act, unless it delegated the power to do so to some one else. *Wait v. Association* (N. H.) 14 S. L. A. 356, 23 Atl. 77, and *Wilson Sewing Machine Co. v. Boyington*, 73 Ill. 534, were both suits to recover for services, as architects, in drawing plans. In each case the defense was a lack of authority in the president to bind the corporations defendant. The supreme court of New Hampshire held to the strict doctrine, referred to above, that no such authority was incident to the office of president; while the supreme court of Illinois adopted a somewhat contrary, and more liberal, view. But a careful examination of the facts in the Illinois case discloses that it appeared on the trial that the president was the executive manager of the corporation, and principal stockholder thereof, and that he, together with another man, also a manager and superintendent, they ordered the plans for the

defendant corporation. But plaintiff in this case cannot rely upon the Illinois decision, because his evidence falls far short of what enabled plaintiff there to recover. For error in overruling the motion for a nonsuit, the judgment is reversed and the cause remanded, with directions to grant a new trial.

Reversed and Remanded.

PEMBERTON, C. J., and BUCK, J., concur.

19	364
125	240

HOLLIDAY, TREASURER, ETC., APPELLANT, v. SWEET GRASS COUNTY, RESPONDENT.

[Submitted April 5, 1897. Decided April 12, 1897.]

Constitution—Special Legislation—New Counties—Liability of.

CONSTITUTION—*Special Legislation*.—Creating a new county by a special act is not forbidden by Section 26, Article 5 of the State Constitution, which provides that "The legislative assembly shall not pass local or special laws * * * regulating county or township affairs, etc."

NEW COUNTIES—*Liability*.—Sweet Grass county was formed of territory formerly included in three other counties. The law creating the county provided that the county commissioners of Sweet Grass county should meet the commissioners of each of the other counties on certain specified and separate dates, to adjust the portion of the debt of each of the three counties which the new county was to assume; that, when each county debt should be adjusted, the Commissioners of Sweet Grass county should issue to each of the other counties, from time to time, a warrant or warrants therefor, payable to * * * the three counties respectively. Held, that the law contemplated the issuance of the warrant to each county on the date fixed for the adjustment of the portion of its debt to be assumed by Sweet Grass county.

SAME.—Under section 3, article 16 of the constitution, providing that upon the establishment of a new county "it shall be held to pay its rateable proportion of all then existing liabilities of the * * * counties from which it is formed," Sweet Grass county was liable for interest upon its portion of the debt of each county until it issued its warrant in payment for that portion.

Appeal from District Court, Sweet Grass County. Frank Henry, Judge.

CLAIM by S. L. Holliday, as treasurer of Park county, against Sweet Grass county. From a decision of the commis-

sioners of the latter county disallowing the claim, claimant appealed to the district court, where judgment was rendered in favor of Sweet Grass county. Claimant appeals. Reversed.

Statement of the case by the justice delivering the opinion.

On March 5, 1895, the act of the state legislature creating Sweet Grass county took effect. The new county was formed of territory previously included in the counties of Park, Yellowstone, and Meagher. Section 4 of this act was as follows: " * * * The county commissioners of Sweet Grass county shall meet with the county commissioners of each of said three first named counties respectively to adjust the respective debts upon the aforesaid basis at the following respective dates, to-wit: Of the county of Park, at Livingston, on the 11th day of March, 1895; of the county of Yellowstone, at Billings on the 18th day of March, 1895; and of the county of Meagher, on the 1st day of April, 1895. When each county debt shall be so as aforesaid adjusted, it is hereby made the duty of the county commissioners of Sweet Grass county to cause to be issued to the county commissioners of each of the said three first named counties respectively, from time to time, a warrant or warrants therefor, payable to the board of county commissioners of each of said three first named counties respectively, each warrant equaling in the aggregate the proportion of each respective net debt, for which said county of Sweet Grass shall be liable under such adjudgment, which said warrants respectively, if not paid on presentation to the treasurer of said county of Sweet Grass, shall be by him endorsed 'Not paid for want of funds,' and from the date of such endorsement bear interest as other county warrants." On March 11, 1895, the boards of county commissioners of Park and Sweet Grass counties duly convened for the adjustment of the indebtedness, as provided for in said section 4, above quoted. Park county on said date had a bonded indebtedness of \$200,000, the bonds drawing interest at the rate of 7 per cent. per annum. Of this bonded indebtedness, under the adjustment, the sum of \$42,774.90 was apportioned to Sweet

Grass county as its share on March 12, 1895. The first regular meeting of the board of county commissioners of Sweet Grass county was held, under the general law of the state (§ 756, div. 5, Comp. St. 1887) regulating the meetings of boards of county commissioners, on June 7, 1895, and a warrant was duly drawn in favor of Park county for the sum of \$42,774.90, and paid. On August 30, 1895, a claim and demand was duly filed by Park county against Sweet Grass county for the sum of \$1,009.96, for interest due on the last-named county's proportion of the bonded indebtedness of Park county from March 12, 1895, to June 7, 1895. At their next regular meeting, on December 4, 1895, the commissioners of Sweet Grass county disallowed said claim for interest. An appeal was taken to the district court. The case was tried on an agreed statement of facts, and judgment rendered in favor of Sweet Grass county. The appeal to this court is from the judgment.

W. H. Poorman, for Appellant.

Sidney Fox, for Respondent.

BUCK, J.—Respondent claims that section 4 of the act creating Sweet Grass county did not contemplate the issuance of the warrant at the meeting held for adjustment of the indebtedness of Park and Sweet Grass counties; and, further, that, if it did, it was in violation of section 26, article 5, of the state constitution, forbidding special legislation. Said section of the constitution provides: "The legislative assembly shall not pass local or special laws in any of the following enumerated cases, that is to say * * * regulating county or township affairs; * * * creating offices or prescribing the powers or duties of officers in counties, cities, township or school districts. * * * In all other cases where a general law can be made applicable, no special law shall be enacted." Creating a new county by a special act is not forbidden by the state constitution, and matters necessarily incidental to the creation of a new county, which are provided for in the act

creating it, solely for the purpose of organizing the new county, and setting it in motion as one of the governmental subdivisions of the state, do not come within either the letter or the spirit of the inhibitions of section 26, article 5, of the constitution. In our opinion, section 4 of the act creating Sweet Grass county contemplated the issuance of the warrant to Park county at the adjustment meeting on March 12, 1895. The language applicable to the issuance of the warrants "from time to time" is fairly susceptible of this interpretation, when considered in connection with the three specific dates previously provided therein for the adjustment of the several county debts for which Sweet Grass county was proportionately liable.

Even, however, if said section did not contemplate this, and the warrant from Sweet Grass to Park county could not have been legally issued at the March adjustment meeting, and was therefore properly issued at the regular June meeting held under section 756, div. 5, Comp. St. 1887, we fail to see how Sweet Grass county, by reason thereof, should be relieved from the liability to pay interest on its ascertained proportion of the bonded indebtedness of Park county from March 12th to June 7th. Section 3, article 16, of the state constitution, is as follows: "In all cases of the establishment of a new county it shall be held to pay its rateable proportion of all then existing liabilities of the county or counties from which it is formed, less the rateable proportion of the value of the county buildings and property of the county or counties from which it is formed: provided, that nothing in this section shall prevent the readjustment of county lines between existing counties." It is clear in its terms. At the time of the adjustment of Sweet Grass county's proportionate share of the bonded indebtedness of Park county, on March 12, 1895, the bonds representing this indebtedness were existing liabilities, drawing a definite, fixed rate of interest. There was no necessity for adjusting Sweet Grass county's proportionate share of the interest to accrue on these bonds up to the time when it should issue a warrant in payment of its liability on account

of them, and stop the interest thereon so far as it was concerned. Even then, if the warrant for its share of these bonds should not have been issued until the June meeting, it would be most unjust to hold that Sweet Grass county could use money it owed from March 12th to June 7th, and compel Park county to pay the interest which it thereby saved. Section 3, article 16, of the constitution, forbids this unequivocally, in our opinion, and the legislature never contemplated what respondent contends for when it passed the act creating Sweet Grass county. Said section expressly declares that a new county shall pay its rateable proportion of all the old county's liabilities. This disposes of respondent's further contention that, if the county commissioners of Sweet Grass county should have drawn the warrant at the March meeting, then they, and not the county they represented, are liable for the neglect. Sweet Grass county has had the benefit of the interest it refuses to pay, and not its officers. The judgment is reversed and the cause remanded, with directions to the district court to enter judgment in favor of appellant.

Reversed and Remanded.

PEMBERTON, C. J., and HUNT, J., concur.

MATUSEVITZ, APPELLANT, v. CITIZENS' DISTRICT
MESSENGER & BURGLAR-ALARM TELEGRAPH
COMPANY, RESPONDENT.

[Submitted April 6, 1897. Decided April 12, 1897.]

Corporation—Action to Compel Transfer of Stock—Pleading.

ACTION TO COMPEL TRANSFER OF STOCK.—An action will not lie to compel a corporation to transfer stock to plaintiff, when it appears that, prior to the purchase of the stock by him, an attachment was levied upon the stock belonging to his vendor.

PLEADINGS—Dental.—In an action to compel a corporation to transfer and issue to plaintiff a certificate of stock, the complaint alleged that a certificate of stock had been issued to "C" and by him transferred to "S" who transferred the same to plaintiff. The answer, among other allegations, stated that while the stock appeared on

the company books in the name of "C" an attachment issued in an action in which "S" was defendant was levied upon all of the interests of "S" in the stock of the company standing in the name of "C," and that at the time of such levy "S" was the assignee of the stock; no replication was filed. *Held*, that defendant was entitled to a judgment on the pleadings.

N. B.—This action was under the former code of practice.

Appeal from District Court, Silver Bow County. J. J. McHatton, Judge.

ACTION by Fannie Matushevitz against the Citizens' District Messenger & Burglar-Alarm Telegraph Company and another. Judgment for defendants, and plaintiff appeals. Affirmed.

S. De Wolfe, for Appellant.

The great weight of authority is, that an assignment of stock in a corporation will be good as against an attaching creditor, or a levy under execution made after the assignment, although no transfer has been made of the stock on the books of the company, and no notice given to it of the assignment or transfer of the stock. The delivery of the certificate (or as, in this case, the assignment) passes the title to the assignee, notwithstanding the by-laws of the corporation may (as in this case), provide that the stock is transferable only on the surrender of the certificate. In support of this proposition, I cite to the following authorities; to which many more might be added: (*McNeil v. Tenth National Bank*, 46 N. Y. 331; *Boatman's Insurance Co. v. Able*, 48 Mo. 136; *Clark v. German Bank*, 61 Miss. 611; *Seligman v. Brown*, 61 Tex. 114; *Broadway Bank v. McElrath*, 13 N. J. Eq. 24; *Wilson v. St. Louis Railroad Company*, 108 Mo. 588; *Hazard v. National Exchange Bank*, 26 Fed. 94; *Continental Bank v. Elliot Bank*, 7 *Id.* 371; *Bank v. Lanier* 111 Wall. 369.)

J. O. Bender, for Respondent.

The new matter in the answer shows that Mary Schultz was the owner of the said stock. (Transcript page 6.) And the same is admitted, not being replied to. It is alleged, not only, that Mary Schultz is the assignee of said stock, but

“that at the time said writ was executed and at the time defendant was notified, as aforesaid, Mary Schultz was the assignee of the said 1605 shares of stock.” This allegation together with other allegations preceding it are not in the complaint, either verbatim or in effect, and is new matter requiring a replication under section 109. The assignment of corporate stock passes all the interest of the assignor as between the parties. (*Bank of Utica v. Smalley*, 14 Am. Dec. 526; *Weston v. Bear River & Co.*, 5 Cal. 186; *Johnson v. Laflin*, 103 U. S. 800; *Duke v. Caharoba Navigation Co.*, 44 Am. Dec. 472; *McNeal v. Tenth National Bank*, 46 N. J. 331; *S. C.*, 7 Am. Rep. 341; *Burgess v. Seligman*, 107 U. S. 32.) Counsel also cited: *Weston v. Bear River & Company*, 5 Cal. 186; *Fort Madison Lumber Co. v. Bank*, 71 Iowa 270; *S. C.*, 32 N. W. Rep. 336; *Commercial National Bank v. Farmer's Bank*, 82 Iowa 192; *S. C.*, 47 N. W. 1080; *Johnson v. Laflin*, 103 U. S. 800; *Blanchard v. Dedham Gas Light Company*, 5 Grey (Mass.) 373; *People's Bank v. Gridley*, 91 Ill. 457; *Nagle v. Wharf Company*, 20 Cal. 530; *Conway v. John*, 14 Col., page 30; *S. C.* 23 Pac. 170; *Farmer's National Gold Bank v. Wilson et al.*, 58 Cal. 600, and § 455, General Laws of the Compiled Statutes.

BUCK, J.—This was an action brought by the appellant (plaintiff below) to compel the respondents (defendants below) to transfer to her certain shares of stock. The result of the trial was in favor of defendants. Among other allegations in the complaint were the following: “For cause of action against defendants, plaintiff says that she is, and has been since the 24th day of December, 1894, the owner of sixteen hundred and five shares of the capital stock of the said Citizens' District Messenger & Burglar-Alarm Telegraph Company; that a certificate for said sixteen hundred and five shares of stock so owned by plaintiff was issued to John W. Cotter, dated on the 12th day of November, 1894, and is numbered 32; that afterwards, on the 24th day of December, 1894, the said John W. Cotter sold, assigned and delivered to Mary

Schultz said certificate of stock; that on the same day Mary Schultz sold, assigned and delivered said certificate of stock to plaintiff, for value, and ever since plaintiff has been, and now is, the owner and holder of said stock, and, as owner and holder thereof, is by right entitled to have said stock transferred to her own name on the stock books of said company, and to have a certificate therefor issued to her, in her own name, in lieu of the certificate she now holds, standing in the name of John W. Cotter." The answer contained, among other allegations, the following: "That on the 24th day of December, 1894, the stock standing in the name of John W. Cotter on the books of the defendant corporation was duly attached in an action brought in the above court, wherein one John O'Rourke was plaintiff and Mary Schultz was defendant; that this defendant was, by virtue of said attachment, notified and warned that all stock of defendant Mary Schultz (in said action) in the Citizens' District Messenger & Burglar-Alarm Telegraph Company, and all interests of Mary Schultz in the stock of said company, 'now standing in the name of John W. Cotter, is this day levied upon,' and further notified thereby not to pay over, transfer or dispose of said property to any one but the sheriff of Silver Bow county, state of Montana, under penalty of the law; that the aforesaid writ still remains in full force and effect, and the property attached thereunder has not been released; that at the time said writ was executed, and at the time defendant was notified as aforesaid, Mary Schultz was the assignee of the aforesaid sixteen hundred and five shares of stock of the Citizens' District Messenger & Burglar-Alarm Telegraph Company." The complaint alleges that Mary Schultz was the owner of the shares of stock in controversy on December 24, 1894. The answer sets forth that at the time said shares of stock were attached, on December 24th, Mary Schultz was the assignee thereof. By failure to file a replication, the fact that Mary Schultz was the owner of the shares of stock at the time they were attached is admitted. Counsel for appellant and respondents both concede that the only point for the consideration of the court is whether or not

the pleadings presented any issue for trial. We do not think they did. There need not have been any trial. If a motion for judgment on the pleadings had been filed by respondents, the district court would have been justified in granting it. It is, therefore, unnecessary for us to consider the evidence on which the lower court found for respondents. The judgment is affirmed.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

19 372
31 317

McDONNELL, RESPONDENT, v. COLLINS ET AL., APPELLANT.

[Submitted April 6, 1897. Decided April 12, 1897.]

VENUE—Action on Account.—Actions on an account should be brought in the county in which the defendants, or some of them, reside, or in the county in which plaintiff resides and in which defendants, or any of them, may be found.

SAME.—In such an action a motion for a change of venue should be granted, when it appears that all the defendants reside and were served with summons in a county other than that in which the action is brought.

Appeal from District Court, Fergus County. Dudley Du Bose, Judge.

ACTION by John J. McDonnell against T. E. Collins and J. T. Armington. Defendants' application for a change of venue was denied, and they appeal. **Reversed.**

Statement of the case by the Justice delivering the opinion.

Plaintiff brought this suit in the district court of Fergus county to recover the amount of an account claimed to be due and owing from defendants. Defendants appeared, and filed their demurrer to the complaint, and at the same time filed affidavits of merits, and a demand in writing that the place of trial be changed to Cascade county, where both defendants now reside, and did reside at the time this action was commenced, in accordance with the provisions of section 614, Code

of Civil Procedure. The court refused to change the place of trial to Cascade county as demanded by the defendants. From this action of the court this appeal is prosecuted.

James Donovan, for Appellants.

Von Tobel & Cheadle, for Respondent.

PEMBERTON, C. J.—We think this is an action of that character which section 613, Code of Civil Procedure, requires to be brought in the county where the defendants, or some of them, reside at the commencement of the action, or where the plaintiff resides, and the defendants, or any of them, may be found. It is not disputed that both defendants resided in Cascade county at the time this action was commenced, and that they were both served with summons in this suit in Cascade county; nor is it claimed that either of them was found in Fergus county. We think, under the showing made by the defendants, that the court erred in refusing to change the venue of the case to Cascade county. (*Wallace v. Owsley*, 11 Mont. 219, 27 Pac. 790; *Paige v. Carroll*, 61 Cal. 215; *Cook v. Pendergast*, Id. 72; *Watkins v. Degener*, 63 Cal. 500; *Yore v. Murphy*, 10 Mont. 304, 25 Pac. 1039.) The order appealed from is reversed and the case remanded, with instructions to the district court to grant the change of venue.

Reversed and Remanded.

HUNT AND BUCK, JJ., concur.

19	374
29	232
19	374
31	73
32	235

VOIGHT, RESPONDENT, v. BROOKS ET AL., APPELLANTS.

[Submitted April 6, 1897. Decided April 12, 1897.]

Action on an Account Stated—Pleading.

ACCOUNT STATED.—An account stated is a balance ascertained between the parties to a settlement; upon the settlement, the law implies a promise to pay the balance found due.

SAME—Pleading.—In an action upon an account stated, it is not necessary to allege a promise to pay.

Appeal from District Court, Fergus County. Dudley Du Bose, Judge.

ACTION by Gustave Voight against H. P. Brooks, John Brooks and Anthony Brooks, partners as H. P. Brooks & Bros., on an account stated. Judgment for plaintiff, and defendants appeal. Affirmed.

Statement of the case by the justice delivering the opinion.

Action on an account stated. The complaint alleged that the defendants were co-partners; that about January 1, 1894, defendants and plaintiff had an account stated, and upon such statement a balance of \$861.48 was found due to plaintiff from defendants for all transactions between them up to and including December 31, 1893; and that about October 20, 1894, there was another account stated between plaintiff and defendants, which said second account included the above-described account and all transactions had between the parties up to and including September 2, 1894, and which last mentioned statement showed a balance of \$1,202.40 due to plaintiff by defendants; that no part of said sum so ascertained to be due had been paid, except \$360, paid in November, 1894, and \$30, paid in April, 1895. Judgment was demanded for \$812.40 and interest. The defendants demurred generally, and upon the further ground that the complaint was uncertain, in that

it did not allege the nature or character of respondent's claim against the appellants for the period of time within which it arose. The district court overruled the demurrer. Defendants having elected to stand upon the demurrer, the court rendered judgment in favor of plaintiff and against defendants. The appeal is from the judgment.

W. M. Blackford, for Appellants.

Frank E. Smith, for Respondent.

HUNT, J.—In support of their general demurrer, the appellants contend that, in an action upon an account stated, the complaint is fatally defective unless it aver that the defendant expressly promised to pay the balance agreed upon by the parties. An account stated means a balance ascertained between the parties to a settlement, and, where plaintiff is able to show that the mutual dealings which have occurred between two parties have been adjusted, settled, and a balance struck, the law implies a promise to pay that balance. (*Watkins v. Ford*, 69 Mich. 357, 37 N. W. 300.) It is strictly evidence of the admission of a debt; it is the acknowledgment of the existing condition of liability between the parties. "From an account stated the law implies a promise to pay whatever balance is thus acknowledged to be due." (*Chace v. Trafford*, 116 Mass. 529.) It is not necessary that there should be an express promise to pay, as appellants contend. On the contrary, there is an implied promise in law on the part of him against whom the balance is found to pay, and action is maintainable thereon. (*Jaques v. Hulit*, 16 N. J. Law, 38; *Vanbebbler v. Plunkett* (Or.) 38 Pac. 707.) In *Heinrich v. Englund*, 34 Minn. 395, 26 N. W. 122, it was said of a complaint similar to that under consideration: "The allegations of the complaint that an account was stated between plaintiffs and defendant, and that upon such statement a certain balance was found due from the latter to the former, fairly mean that the parties had an accounting, and that the balance named was

agreed on and admitted as the true balance between them. To allege a promise to pay this balance was unnecessary, and would really have added nothing to the complaint. It was sufficient to state the facts showing the duty to pay, without alleging the promise by law from these facts." The following authorities are directly in point to the effect that under code procedure it is not necessary to allege a promise to pay, it being sufficient to allege the facts from which the duty to pay arises: Pom. Code Rem. § 538 *et seq.*; Baylies' Code Pl. § 27; Phil. Code Pl. § 474; *Mackey v. Auer*, 8 Hun. 180; *James v. Fellowes*, 20 La. Ann. 116; *Claire v. Claire*, 10 Neb. 54, 4 N. W. 411; *Bouslog v. Garrett*, 39 Ind. 338. The general demurrer was properly overruled.

McFarland v. Cutter, 1 Mont. 383, cited by appellants, did not decide that a complaint in an action on an account stated must necessarily allege that the defendants agreed to pay the sum ascertained to be due. The court simply sustained the complaint which contained an averment to that effect, without discussing, however, whether such averment was or was not indispensable to the validity of the complaint. We do not think the demurrer on the ground of uncertainty was well taken, as, under the authorities heretofore cited, the complaint contained the usual and sufficient allegations upon an account stated. The judgment is affirmed.

PEMBERTON, C. J., and BUCK, J., concur.

MAHONEY, RESPONDENT, v. BUTTE HARDWARE COMPANY, APPELLANT.

19 377
27 448

[Submitted March 22, 1897. Decided April 12, 1897.]

Pleading—Denials—Admissions—Corporations—Agency.

PLEADINGS—Denials.—A replication which denies that plaintiff's claim was assigned to defendant for collection "as alleged in the answer," admits that it was assigned for collection.

PLEADINGS—Inconsistent.—A complaint and a replication which are contradictory will not support a judgment.

SAME.—Where, however, in such a case plaintiff, without objection, is allowed to make his pleadings consistent, a judgment will not be reversed.

SAME—Admission.—A party is not bound by admissions in a pleading which he has abandoned or amended.

CORPORATIONS—Ultra Vires.—A corporation organized to carry on hardware business has power to buy claims against third parties indebted to it, when such purchases are made in good faith and for the protection of its own claims.

SAME—Agency.—Where it appears that the manager of a corporation has bought other claims against third parties indebted to it, and that it has brought suit for the collection of the claim of plaintiff against such third parties purchased by such manager, a verdict will not be set aside on the ground that the authority of the manager was not shown.

SAME.—Where an agent's authority to purchase such claims is at issue, it is error to refuse to admit in evidence the articles of incorporation of the company.

EVIDENCE.—It is error to refuse to admit cross-examination of a witness on an immaterial matter testified to by him, when an instruction is subsequently given on the theory that such testimony was competent and material.

SAME.—Where, to show the authority of an agent to buy plaintiff's claim against third persons, prior purchases of claims by him are admitted in evidence, it is error to refuse to admit in evidence judgment-rolls in suits showing that such claims entitled the holders thereof to a specific lien on property, as such evidence might tend to show that the manager's authority was confined to the purchase of similar claims.

N. B.—This case was brought under former Code of Practice.

Appeal from District Court, Silver Bow County. J. J. McHatton, Judge.

ACTION by Edward L. Mahoney against the Butte Hardware Company. Judgment for plaintiff, and defendant appeals. Reversed.

Statement of the case by the justice delivering the opinion.

Mahoney (plaintiff and respondent herein) had an account against the Shonbar Mining Company, a corporation, for a boiler sold to it and labor performed in its behalf. This ac-

count amounted to \$1,691.31. He assigned it to the Butte Hardware Company, a corporation (appellant and defendant herein). The complaint contains two counts based on this transaction. The first count sets forth that said account was sold and assigned to defendant on November 3, 1891, and that defendant agreed to pay plaintiff therefor. The second count sets forth a sale, assignment, and transfer of the account to defendant for collection. It alleges that the defendant was to collect the account and pay it over to plaintiff; that defendant, as assignee of said account and other accounts due from the Shonbar Mining Company, had brought suit against the last-named corporation, and obtained a judgment, had levied an execution on its mines, and had obtained a sheriff's deed thereto. The relief prayed for in this second count was that the defendant should be declared a trustee of said mining property to the extent of \$1,691.31. The answer of defendant denied any absolute sale; denied that the account had ever been collected, either in money or property; denied that any execution had ever issued on the judgment in which it was included; and denied that the Shonbar property had ever been sold under said judgment. It averred that, prior to the date of the assignment, four actions had been commenced in the proper district court against the Shonbar Mining Company, by certain lien claimants, and that a judgment for foreclosure had been obtained in said suits in October, 1891, to satisfy the liens, and that the property of the Shonbar Mining Company had been sold, and bought in for the aggregate amount of these four judgments. It averred that, during the period of redemption of said property—that is, before a sheriff's deed could be issued on the sale under the executions of the four judgments aforesaid—it had secured the judgment mentioned in the complaint; that, at the time of the institution of the suit resulting in such judgment, an attachment had been levied upon the property of the Shonbar Mining Company; and that, in order to protect its own and plaintiff's interests, it had become necessary to redeem the Shonbar property, or to purchase the sheriff's certificate of sale; and that accordingly it had

purchased said certificate from the original purchaser thereof, one McGillis; and that it subsequently received a sheriff's deed after the period of redemption had elapsed. It alleged "that the assignment made by plaintiff to the defendant of his said claim against the Shonbar Mining Company was taken by defendant as a matter of accommodation to plaintiff, and not for advancing any purpose of its own, but with the understanding that plaintiff himself, as well as the defendant, should take an interest in the said suit, and in enforcing the collection of the several claims made the basis of said suit, and in payment of the expenses of the same." It further alleged "that plaintiff has never paid anything as attorney's fees or for costs in said suit, and entirely neglected the said suit, and refused to pay the defendant any portion of the price of said property paid by defendant in procuring the said certificate of sale and sheriff's deed, although by defendant requested to do so." The replication contains the following denials: "Denies that plaintiff's claim against the Shonbar Mining Company was assigned to the defendant for collection, as alleged in defendant's answer to plaintiff's second cause of action; denies that the said account of plaintiff against the said Shonbar Mining Company was assigned to defendant for any other purposes than as alleged in plaintiff's complaint herein." The replication admitted that the Shonbar property was sold under the executions on the four judgments mentioned in the answer, but averred that the defendant purchased all the claims of all the laborers to whom the Shonbar Mining Company was indebted, and had been buying them at a discount, and that the McGillis suit (one of the four foreclosure suits mentioned in the answer) was prosecuted for and in behalf of the defendant. It then denies the allegations in the answer that the account was taken by the defendant as a matter of accommodation, etc., and substantially declares that it was agreed between plaintiff and defendant that, if defendant should obtain a sheriff's deed to the Shonbar property, the plaintiff should be paid his account in full, but without interest. It admitted that plaintiff had never paid any of the expenses connected

with the judgment, which included the account sued on, but averred that no such agreement existed requiring plaintiff to do so. After the plaintiff had rested, and certain evidence had been introduced for defendant, plaintiff's counsel made the following announcement in open court: "I desire to announce that we are going to stand upon our first cause of action in this complaint. We have alleged two causes, but we think our first cause of action is the one we are entitled to recover on; and our evidence only goes to support that allegation, which is a sale of an account to the Butte Hardware Company on condition that they were to pay it on procuring title to this property." No exception was saved to the withdrawal of the second count in the complaint. It appears from the record that the Shonbar Mining Company was financially involved. Numerous laborers' liens, amounting in all to some \$7,000, had been filed on its property, and it was indebted to other parties in the sum of some \$3,800; the appellant, the Butte Hardware Company, being a creditor to the extent of \$1,123.50. Four suits had been commenced to foreclose these liens in the month of October, 1891. McGillis, the plaintiff in one of them, had sued on a lien claim of his own and a number of other such claims which had been assigned to him. The manager of the Shonbar Mining Company came to Watson, the manager of the Butte Hardware Company, and suggested to him and other officers of it that their company should take assignments of the various accounts against the Shonbar Company, and put them into one judgment, so as to save expense to his corporation. He stated that he believed that all the debts of the Shonbar Company would be paid in a short time. This suggestion was followed, and various accounts were assigned to appellant, ranging from very small to large amounts (plaintiff's account among them). Suit was brought by appellant on its own and these assigned accounts, and in the complaint in this suit it was alleged that the Mahoney and the other assigned accounts had been sold and transferred to it. The claims in the McGillis suit were bought from time to time, at a discount, by appellant, but whether before or after

the assignment of plaintiff's account, does not appear. Watson, appellant's manager, seems to have acted in its behalf in the matters connected with these assignments, purchases, and suits aforesaid, and many of the transactions were had at the place of business of appellant. The evidence on the trial was conflicting. The jury found a verdict for plaintiff, and the appeal is from an order denying a motion for a new trial and the judgment.

F. T. McBride, for Appellant.

John W. Cotter, for Respondent.

BUCK, J.—Do the pleadings support the judgment? The first cause of action set forth in the complaint is directly in conflict with the one in the second count. The replication first denies "that plaintiff's claim against the Shonbar Mining Company was assigned to the defendant for collection, as alleged in defendant's answer." This denial is equivalent to an admission that the account was assigned to it for collection. The second denial of the replication also is equivalent to a declaration that all the statements of the complaint are true. The replication then sets forth a cause of action which, while not inconsistent with, differs somewhat from the cause of action relied upon in the first count of the complaint. If the plaintiff had not been allowed without objection to abandon the allegations of his pleadings on which one of his theories of recovery was based, we should not hesitate to follow the rule laid down in *Hauswirth v. Butcher*, 4 Mont., at page 309, 1 Pac. 714, and would reverse the judgment, on the ground that the complaint and replication, being contradictory, do not support it. In the same verified complaint, plaintiff swears that certain facts are true, and that these facts are not true; and, in his verified replication, he also swears to statements contradictory to each other, and which substantially reiterate the contradictions contained in the complaint. The complaint is inconsistent and the replication is inconsistent, each within itself and each as to the

other. But this inconsistency was eliminated when respondent was permitted to abandon the cause of action in his second count, and to substitute for the cause of action in the first count the one more particularly, but not inconsistently, averred in the replication.

Appellant insists that the respondent is absolutely bound by his admission in the pleadings that the account had been assigned for collection. We do not think he was. The rule is that a party is bound only by the admissions in the pleadings upon which he goes to trial. (*Pyister v. Wade*, 69 Cal. 136, 10 Pac. 369.)

Appellant contends that the respondent failed to establish any authority on the part of Watson, its manager, to enter into the agreement with him for the sale of the account. The argument is that appellant is a corporation organized for the purpose of dealing in hardware; that, under the terms of its charter and the laws of the state, even its directors could not have authorized the purchase of plaintiff's claim; and that far less, therefore, could its manager, Watson, have purchased the account in behalf of the company. Appellant does not dispute the fact that it took assignments of accounts against the Shonbar Mining Company, and brought suit upon them. It admits that it bought the McGillis claims. It insists that these latter accounts were bought to protect its own claim against the Shonbar Company. It virtually concedes that Watson, its manager, represented it in all these matters. It does not for a moment suggest that he had no authority to so represent it, but contends that, while Watson had authority to take assignments of accounts for collection, and to buy lien claims against the Shonbar Company to protect appellant's interest, neither he nor the directors of the company had authority to purchase plaintiff's account. Under such a condition of facts, is this a tenable position? We think not. Why it should be *ultra vires* to buy plaintiff's claim, but not *ultra vires* to buy the McGillis lien claims and the sheriff's certificate of sale under the lien foreclosure suits, we do not comprehend. Even if Watson had no authority to purchase plaintiff's claim,

if he did purchase it under the circumstances aforesaid, is appellant now in a position to reject his act in doing so? Can it not be reasonably inferred that it countenanced whatever he (Watson) did?

Appellant brought suit on the claim after assignment, and reduced it to judgment. In the verified complaint it filed for the purpose, it set forth that the plaintiff's claim had been sold and assigned to it. The plaintiff testified that he had a right to a lien, and would have secured his account by filing a lien but for the agreement entered into with Watson. If Watson had authority from his company to accommodate the Shonbar Company by taking assignments of accounts, and had authority to buy other lien claims against the Shonbar Company to protect his own company's claim, how can it, in fairness, be contended, if plaintiff had a right to and could have filed a lien and secured his claim, that he (Watson) had no authority to purchase plaintiff's claim also for the protection of appellant? It was not *per se* an act of *ultra vires* for the appellant to purchase claims against the Shonbar Mining Company, secured by liens, in order to protect its own account. Conceding that it was organized to do a hardware business only, still, if, in the course of its legitimate business, it became necessary, in the exercise of business prudence, to purchase these claims for the protection of its own interest, and such claims were purchased in good faith, for that purpose only, that would not have been a violation of its charter or of the statutes of the state pertaining to corporations of its character. There was evidence to support the verdict as to an absolute purchase by appellant of respondent's account.

Appellant offered in evidence its articles of incorporation, for the purpose of showing what business it was authorized to transact, as affecting the question of Watson's authority. An objection was sustained to the introduction of the same. This was error. The case was tried apparently simply with reference to whether or not the agreement between Watson and plaintiff was for a sale or not. Watson's authority to bind the company in the purchase of this account was an issue in

the case also, however, and it should not have been ignored.

The plaintiff was allowed to testify as to the date of the items of his account, in order to show that he was entitled to a lien thereon at the date of its assignment, and an instruction was asked and given as to this testimony. On cross-examination plaintiff was asked: 'At what date did you sell the first item to the Shonbar Mining Company?' This was objected to as immaterial, and the objection sustained. On the theory that the sole issue in the case was as to the terms of the agreement between Watson and plaintiff, regardless of Watson's authority to bind his company, no doubt all evidence as to the items of the account, in order to establish a right to a lien, was immaterial. But the question of Watson's authority, and, as connected with it, the question of whether plaintiff had a right to a lien, were also involved, and, as shedding light on these questions, such evidence was admissible. But, even if an answer to the question asked plaintiff had not been admissible, allowing plaintiff to give such testimony as to the items of his account on direct examination, and refusing to allow appellant to cross-examine, and then giving an instruction as to such testimony on the theory that it was competent and material evidence, was prejudicial error.

The judgment rolls in the foreclosed lien suits were offered, for the purpose of showing the character of the suits and liens, and as bearing on the question of Watson's authority to purchase plaintiff's account. On objection they were excluded. This was error. They should have been admitted, for, if it had been shown that the plaintiff was not entitled to a lien on the account he assigned to appellant, they might have shed light in the determination by the jury of whether or not Watson had authority to purchase for the appellant an account not secured by a lien.

There are other errors assigned, but we need not discuss them, as what we have already decided disposes of them. Not only the question of whether or not Watson, the manager of appellant, absolutely purchased plaintiff's account, should have been submitted to the jury, but also the question of

whether or not Watson had authority to purchase it, and, as incidental thereto, the question of whether plaintiff was entitled to a lien on his account, should also have been submitted. The judgment is reversed, and the cause remanded, with directions to the lower court to grant a new trial.

Reversed and Remanded.

PEMBERTON, C. J., not sitting. HUNT, J., concurs.

GOODKIND, APPELLANT, v. GILLIAM, RESPONDENT.

[Submitted March 25, 1897. Decided April 12, 1897.]

Conditional Sale—Estoppel—Instructions.

19	385
24	484
19	385
28	196

CONDITIONAL SALE—Estoppel.—Plaintiff sold to "L" certain chattels; the terms of the sale provided that title should remain in the vendor until the purchase price was paid; plaintiff afterwards took a chattel mortgage on the property from "L," which he foreclosed; plaintiff was the purchaser at the sale; he then turned the property over to "L" under the original agreement; held that plaintiff was not estopped to deny "L" title, in an action to recover the property which had been seized by a creditor of "L."

INSTRUCTIONS.—In an action to recover the chattels, in which the evidence established the facts above stated; held, it was error to charge the jury in the language of the statute concerning fraudulent conveyances; because the instruction was not applicable and was misleading.

Appeal from District Court, Jefferson County. Frank Showers, Judge.

ACTION by Edward I. Goodkind against Alexander Gilliam. From a judgment in favor of defendant, and from an order denying a new trial, plaintiff appeals. Reversed.

Statement of the case by the justice delivering the opinion.

This is an action to recover the possession of personal property. The property consists of a billiard table and bar fixtures, such as ordinarily pertain to a billiard saloon, which are alleged to be of the value of \$1,000. The complaint alleges

the plaintiff to be the owner, entitled to the possession of the property, and charges the defendant with wrongfully taking possession, and converting and disposing of the same to his own use. The allegations of the complaint are denied by the answer; and the defendant then alleges affirmatively that he is the sheriff of Jefferson county, and attempts to justify the taking of the property mentioned in the complaint by virtue of a writ of attachment issued out of a justice's court in Jefferson county on the 11th day of January, 1895, in an action before such justice of the peace, wherein one J. B. Maxfield was plaintiff and one J. B. Loeb was the defendant. The property was attached by the sheriff under said writ of attachment in the possession of said Loeb. The case was tried to a jury. The evidence substantially shows that the plaintiff in this suit had for a long time been the owner of the property in question, and that some years ago he made a conditional sale thereof to said Loeb, the conditions of which were that Loeb should take possession of the property and use the same; that he should pay the taxes thereon, and should carefully use it; and that the title, during the time Loeb had possession of the goods, was to remain in the plaintiff until Loeb should fully pay therefor. Under this agreement, Loeb had possession of the property some years, during which time some attorney, it seems, advised the plaintiff that he had better take a chattel mortgage from Loeb on the property, and have the same properly recorded in Jefferson county. This the plaintiff did. This mortgage, it appears, was either renewed, or new mortgages given, from time to time. Finally it seems that, Loeb failing to pay for said property, or to comply with his agreement in relation thereto under the mortgage, plaintiff had the sheriff of Jefferson county take charge of the property under the terms of the mortgage, and foreclose it. The property was, under these foreclosure proceedings, by the sheriff, turned over to one Sparling, who took and held possession for some days as the agent of the plaintiff. Some time thereafter the plaintiff turned the property over again to Loeb under the original contract of conditional sale, and Loeb kept possession

thereof under such conditional sale until it was levied on by the sheriff under the Maxfield attachment, referred to above. The plaintiff, having ascertained that the property had been attached by Maxfield in the suit against Loeb, made a written demand for the possession thereof upon the defendant, who refused to deliver the goods to him. The defendant in this case offered no evidence to rebut the evidence of plaintiff's title as stated above. It seems that the defendant offered some proof showing the possession of the property in Loeb, and the execution of the chattel mortgage from Loeb to Goodkind of the goods; proceeding, seemingly, upon the theory that thereby the plaintiff was estopped from claiming to be the owner and entitled to the possession of the goods in question. Verdict and judgment thereon were rendered for defendant. Plaintiff appeals from the judgment and an order denying a new trial.

S. H. McIntire and H. G. McIntire, for Appellant.

PEMBERTON, C. J.—The validity of the conditional sale by plaintiff to Loeb is not attacked by the defendant. The instructions of the court proceed upon the theory that the contract of sale of the property by plaintiff to Loeb was valid, and that plaintiff's rights were amply protected and preserved by such arrangement. The validity and regularity of the chattel mortgage from Loeb to plaintiff are not disputed. It seems from the course of the examination of the witnesses by counsel for defendant that the contention of the defense was that the plaintiff, having accepted the chattel mortgage from Loeb, was estopped from asserting his own title in the case. But, if he did admit Loeb's title by accepting the mortgage, he got rid of it by foreclosure. These foreclosure proceedings are not attacked. Under these proceedings, plaintiff got the possession of the goods. Afterwards he turned them over, under the original agreement with Loeb that he was to have title when he paid for the property. It nowhere appears that Maxfield was ever misled, or gave credit to Loeb on the belief that he was the owner of the property.

The records of Loeb's title showed that his title had been foreclosed. So that, instead of the records showing title in Loeb, they showed the contrary. There is no ground for invoking the doctrine of estoppel in this case.

For some reason the court, after charging the jury very fairly as to the law of the case, gave this instruction: "Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by the immediate delivery, and be followed by an actual and continued change of possession, of the thing sold and assigned, shall be conclusive evidence of fraud, as against the creditors of the vendor, or the person making such assignment, or subsequent purchasers in good faith." There is no evidence in the case that would render the giving of this instruction proper. It seems that the giving of it was prejudicial to the plaintiff, for it was calculated to mislead the jury into the belief that the plaintiff had sold the property to Loeb under such circumstances as to bring the sale within the statute of frauds. (*Walsh v. Mueller*, 18 Mont. 180, 40 Pac. 292. and cases cited; *Thomp. Char. Jur.* § 63.) We think the verdict is not supported by the evidence. The court erred in refusing a new trial, and in giving the instruction treated above. For these reasons the judgment and order appealed from are reversed, and the cause remanded for new trial.

Reversed and Remanded.

HUNT and BUCK, JJ., concur.

MURRAY, APPELLANT, v. CONLON ET AL., RESPONDENTS.

19	388
19	393
19	389
20	47

[Submitted April 5, 1897. Decided April 26, 1897.]

Partition—Attorney's Fees.

Under section 1391, Code of Civil Procedure, which provides the "costs of partition, including reasonable counsel fee expended by the plaintiff or either of the defendants for the common benefit * * * must be paid by the parties entitled to share in the lands, etc." The services of plaintiff's attorney in preparing the complaint and in conducting the trial should be included in the costs of the action, as they are for the "common benefit."

Appeal from District Court, Silver Bow County. J. J. McHatton, Judge.

PARTITION suit by James A. Murray against Patrick Conlon and others. From orders of the court setting aside a fee originally taxed in favor of plaintiff's attorney, in hearing evidence of the value of only such services as were rendered after the decree and judgment were signed, and reducing the fee, plaintiff appeals. Reversed.

Statement of the case by the justice delivering the opinion.

Suit for the partition of certain realty in the county of Silver Bow. The complaint alleged that the ownership and possession of the property, which was a mining claim, was productive of great inconvenience to the parties, and particularly to the plaintiff. The prayer was for a partition according to the respective rights of the parties interested, and for sale in case partition in kind could not be made without great prejudice, and for costs and further relief. Francis Brooks, Esq., appeared as attorney for certain of the defendants, who were minors, and as guardian *ad litem* for said minors, and demurred to the complaint. Thereafter, by consent, the demurrer was overruled. The court thereupon made a formal decree of partition, reciting the overruling of the demurrer by consent, heretofore referred to, and the failure on the part of

other defendants to answer the complaint of plaintiff; and reciting, further, the respective interests of the parties in and to the property involved, and ordering that the mining claim be sold at auction, appointing a referee to conduct the sale, and to do what was necessary for the carrying out of the decree, and directing the referee to make his report to the court for confirmation. On February 8, 1896, the plaintiff in this suit, through his counsel, applied to the court for an attorney's fee to be allowed to him for services rendered in and about the proceedings for the partition of the property. An attorney was sworn, who testified that \$500 was a reasonable attorney's fee, and thereupon the court made an order taxing an attorney's fee of \$400, as costs in the cause. Subsequently, a bill of costs, including the \$400 allowed by the court as an attorney's fee to plaintiff's attorney, was served upon the counsel for the defendants, who had appeared. Thereafter the referee made his report, and in the costs the referee included the \$400 that had been allowed by the court to plaintiff's counsel, and plaintiff applied to the court for an order approving and confirming the referee's report. The court thereupon, of its own motion, and without objection or motion on behalf of any parties to the action, vacated the order originally made, allowing plaintiff's attorney's fee of \$400, and decided that it would allow a reasonable compensation for plaintiff's counsel for services rendered in the cause "for the common benefit of all parties, and determined that the sum of \$100 was a reasonable counsel fee for the services rendered for the common benefit of all parties." Upon this, plaintiff's counsel offered evidence to the effect that all the services rendered were of the reasonable value of \$400. But the court only allowed \$100 to be taxed as costs, and limited the allowance for services rendered by plaintiff's counsel after entry of the judgment and decree, the court ruling that such services appeared to it from the evidence to be the only services rendered for the common benefit of all parties, and that all other services appeared to the court from the evidence to have been rendered for the benefit of the plaintiff alone. The plaintiff's counsel,

having saved his exceptions to the several rulings of the court, appeals to the supreme court from the order of the district court setting aside the attorney's fee originally taxed at \$400, and from the order of the court in hearing evidence as to the value of the services of plaintiff's attorney only after the decree and judgment were signed, and from the order of the court reducing plaintiff's attorney's fee to \$100.

Chas. O'Donnell, for Appellant.

HUNT, J.—Section 1394, Code of Civil Procedure, provides that "the costs of partition, including reasonable counsel fees expended by the plaintiff or either of the defendants for the common benefit, fees of referees or other disbursements, must be paid by the parties respectively entitled to share in the lands divided in proportion to their respective interests therein, and may be included and specified in the judgment." It appears from the record that the learned judge of the district court, in reducing the allowance originally made as a fee to the plaintiff's counsel, was of the opinion that the services rendered by such counsel in preparing the complaint in partition, and in conducting the proceedings had prior to the judgment and decree, acted in behalf of plaintiff alone, and did not perform such services for the common benefit of all parties. But, under the conditions apparent in this case, we think this construction of the statute is incorrect. The plaintiff was obliged to resort to proceedings in partition to effect a division of the property held by him and the defendants. To conduct such proceedings, it was necessary for plaintiff to employ counsel, and the action taken by such counsel, it appears by the decree rendered by the court, was certainly beneficial to all of the defendants, as well as to the plaintiff. We believe that the statute recognizes that proceedings in partition are for the benefit of all parties to the action; and it was for this very reason provided that the parties determined by the court to be entitled to share in the lands divided should be liable for the costs of partition, including reasonable counsel fees expended by the plaintiff or either of the defendants for the

common benefit of all. The object and design of the provision cited from the partition act was to place the parties upon a relative equality as to the necessary expenses in effecting a partition of the common property. (*Appeal of Fidelity Insurance, Trust & Safety-Deposit Co.*, 108 Pa. St. 339.)

We therefore think that it was error for the court to limit an allowance to services performed after entry of judgment and decree, and that compensation should be allowed to appellant for necessary professional services of counsel in conducting the proceedings in partition to a completion for the common benefit of all parties thereto. We do not feel called upon to fix the amount or the fees to be allowed to the plaintiff's counsel. The district court is in a far better position to do so, and it is proper that it should. In doing so, if it appear to the court that it was necessary for their common benefit for defendants to employ counsel to protect their interests, and secure a just partition, there should be allowed, as costs, reasonable counsel fees so expended by defendants, which should be considered in fixing plaintiff's attorney's fees, as in such cases the statute does not contemplate that defendants should pay not only their own counsel, but also be taxed for part of the fees of opposing counsel. (*Kilgour v. Crawford*, 51 Ill. 249.) The orders appealed from are reversed, and the cause is remanded to the district court, with directions to allow to the plaintiff, as part of the costs of the partition, reasonable counsel fees expended for the common benefit of all, according to the rule above indicated, and to tax such costs in accordance with the statutes.

Reversed and Remanded.

PEMBERTON, C. J., and BUCK, J., concur.

MURRAY, APPELLANT, v. MILZ ET AL., RESPONDENTS.

[Submitted April 5, 1897. Decided April 26, 1897.]

Appeal from District Court, Silver Bow County. J. J. McHatton, Judge.

PARTITION SUIT by James A. Murray against August Milz and others. From orders of the court setting aside a fee originally taxed in favor of plaintiff's attorney. Reversed.

Chas. O' Donnell, for appellant.

PER CURIAM.—Suit in partition involving issues similar in all material respects to those discussed and passed upon in the case of *Murray v. Conlon*, ante, 48 Pac. 743. The appeal is also from like orders pertaining to attorney's fees, and from the ruling of the district court in relation to the allowance of such fees. Inasmuch as the several questions herein involved have been already reviewed in the case just referred to, it is unnecessary to repeat our views upon them. It is ordered, therefore, that upon the authority of the case of *Murray v. Conlon*, supra, the orders appealed from are reversed, and the cause is remanded to the district court, with directions to allow reasonable attorney's fees, under the rule laid down in the decision last above referred to.

Reversed and Remanded.

WHITESIDE, APPELLANT, v. CATCHING, RESPONDENT.

[Submitted April 12, 1897. Decided April 26, 1897.]

Statute of Limitation—Death of Debtor—Action against Administrator on Judgment.

STATUTE OF LIMITATION—Action on Judgment.—Under Compiled Statutes, 1887, an action on a judgment must be commenced within six years, save when the time is extended by section 52, Code of Civil Procedure.

SAME—Death of Judgment Debtor.—The statute of limitation does not cease to run on account of the death of the judgment debtor, except that the time between his death and the granting of letters of administration is not to be counted as part of the six years.

Appeal from District Court, Granite County. Theodore Brantley, Judge.

ACTION by Andrew J. Whiteside against W. E. Catching, administrator of the estate of Joel P. Catching, deceased. Judgment for defendant, from which, and from an order denying a motion for new trial, plaintiff appeals. Affirmed.

Statement of the facts by the justice delivering the opinion.

The facts in this case were as follows: The appellant, Whiteside, obtained a judgment against one Joel P. Catching on October 22, 1888. On August 30, 1894, said Catching died, intestate. On September 22, 1894, letters of administration were issued to W. E. Catching. On November 9, 1894, said Whiteside presented his judgment as a claim against the estate to said administrator. On the same day the administrator rejected it. Appellant brought suit on the judgment against the administrator on February 7, 1895. The answer of the administrator pleaded in bar the general statute of limitations. Upon the trial the court held that the action was barred by the said statute of limitations. The appeal is from the judgment and the order denying a motion for a new trial.

Napton & Napton and *O. B. O'Bannon*, for Appellant.

E. Scharnikow, for Respondent.

BUCK, J.—The general statute of limitations (section 41, First Division of the Compiled Statutes 1887) prescribed six years as the period within which actions on judgments could be instituted. At the date of Joel P. Catching's death there remained, of the six years within which an action on the judgment against him could have been brought, one month and twenty-two days. There was no administration from the date of the judgment debtor's death on August 30th to September 22d, when letters of administration were issued,—a period of twenty-two days. Under section 52, First Division Compiled Statutes of 1887, this period of twenty-two days was excluded from the six years. Therefore, the judgment was not barred under the general statute of limitations until November 13, 1894. Appellant presented his claim to the administrator on November 9, 1894, and it was promptly rejected on that day. Suit was instituted on February 7, 1895. Under the general statute of limitations (section 41, *supra*), the action instituted on February 7, 1895, was clearly barred.

Appellant insists, however, that the general statute (section 41, *supra*) was superseded by section 155, Second Division Compiled Statutes of 1887, which provided that a suit should be brought on a claim rejected by an administrator within three months after its rejection. The only question in the case is whether or not said section 155 takes the place of section 41. The case of *Quivey v. Hall*, 19 Cal. 98, is cited. In that case, the Supreme Court of California, having under consideration statutes somewhat similar to the Montana probate statutes of 1887, said: "The statute substituted the presentation of the claim for suit. * * * But the right to sue does not come from the existence of the claim and the nonpayment. It comes from the refusal of the executor to acknowledge it as a just claim against the estate. This right, therefore, does not accrue until the presentation of the claim, and the party is not bound to present it until after publication of the notice required by the statute." The record in the case of *Quivey v. Hall* failed to show that any notice to creditors

had ever been published; and it appears that no letters of administration had been issued upon the judgment debtor's estate for four years and some ten months subsequent to his death. Excluding that time from the period of five years within which the action could have been instituted on the judgment, it is manifest that the general statute of limitations in force in California at the time had not run its full course. The case was no doubt correctly decided, but with the above reasons assigned for the decision, in so far as they support appellant's contention, we cannot agree. A very late California case (*McMillan v. Hayward*, 94 Cal. 357, 29 Pac. 774, decided in 1892, under statutes almost identical with those in force when *Quivey v. Hall* was decided, and substantially the same as the Montana probate statutes of 1887) virtually overrules *Quivey v. Hall*. In this case the court held that a suit on a judgment rendered in the lifetime of a decedent was barred by the general statute of limitations, and this, too, although it was conceded that the executrix had not published notice to creditors. The court even said upon this question of notice: "The giving or the not giving of that notice does not affect the general statute of limitations. That is simply of probate procedure." At common law the death of the debtor did not stop the running of the statute of limitations. The Compiled Statutes of 1887 nowhere expressly provided that upon the death of a debtor the general statute of limitations should cease to run on a claim against the estate. They did not contain section 543 of the Code of Civil Procedure of 1895, which allows a judgment creditor one year after decedent's death for the commencement of an action on his claim. The California statutes, however, contained this provision both at the time when *Quivey v. Hall*, *supra*, and when the decision in *McMillan v. Hayward* were rendered. Section 162, Second Division Compiled Statutes of 1887, does forbid an execution to be issued on a judgment rendered against a decedent when alive, save in special cases. But we do not think it can be reasonably inferred that it was the intention of the legislature, in the enactment of section 162, *supra*, and

the other sections regulating estates of decedents, to interfere in any manner with the running of the periods prescribed by the general statute of limitations within which actions could be commenced. Appellant had from the 21st day of September until the 13th day of November within which to present his claim to the administrator. He even had three days after its rejection in which to institute his suit. There is no suggestion whatsoever of bad faith on the part of the administrator in reference to the action he took on the claim presented to him. The appellant is in no position to complain of the law. He must suffer from his own neglect. The judgment is affirmed.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

BARRETT, RESPONDENT, v. SHANNON, COUNTY TREASURER, APPELLANT.

[Submitted April 12, 1897. Decided April 26, 1897.]

Tax Assessment—Correction—Action to Recover Money Paid thereunder—Pleading.

ERRONEOUS ASSESSMENT—Correction.—Under section 3782, Political Code, no reduction in assessments of property can be made unless the party assessed makes and files with the Board of Equalization a written application therefor, verified, and showing the facts upon which the claim for reduction is based.

ACTION TO RECOVER TAXES PAID—Pleading.—In an action brought to recover money paid for taxes claimed to be unlawfully assessed, the complaint must show that plaintiff filed the written application above referred to.

Appeal from District Court, Beaverhead County. Frank Showers, Judge.

ACTION by Martin Barrett against J. G. Shannon, treasurer of Beaverhead county, to recover taxes paid. Judgment for plaintiff, and defendant appeals. Reversed.

Statement of the case by the justice delivering the opinion.

The defendant is the treasurer and collector of taxes in Beaverhead county. The complaint alleges that on the 30th

19	397
19	401
19	397
28	282
19	397
32	458

day of November, 1895, the defendant (appellant here), as such treasurer and collector of taxes, demanded of plaintiff the sum of \$1,553.80, which the defendant claimed was then due from the plaintiff (respondent in this court) for taxes for the year 1895, levied upon the property of plaintiff for that year. It further alleges that said sum was not due from plaintiff for taxes for that year, but that only the sum of \$1,091.15 was due from the plaintiff for taxes for said year on his property, and that, notwithstanding said last-named sum was all that was due for such taxes for said year, the plaintiff was compelled to pay, and did pay, the sum of \$462.65 additional to the defendant, as such officer, as taxes for the above-named year, and which said sum plaintiff alleges was paid by him to the defendant under protest. the plaintiff deeming the collection of the same by the said defendant illegal and wrongful. The complaint, in substance, further alleges that on the first Monday in the month of March, 1895, the plaintiff was the owner of, and liable for taxation upon, 1 500 head of cattle, of the value of \$15 per head, but that, between the said first Monday of March and the second Monday of July of said year, plaintiff returned to the county assessor of the county of Beaverhead, among other real and personal property, a statement of the said 1,500 head of cattle so owned by him at the said time, as he was required by law so to do; that said county assessor refused to take plaintiff's return and statement as to the number of cattle owned by him, and which was subject to taxation, but did list and assess the plaintiff for 3,000 head of cattle, at \$15 per head, thereby listing and assessing the said plaintiff for 1,500 head of cattle more than he owned, and for which he was liable to be taxed at said time. The plaintiff then alleges that thereafter he appeared before the board of county commissioners, sitting as a board of equalization, and protested against the said assessment of said 1,500 head of cattle, of the value of \$15 per head, in excess of the number of cattle actually owned by him, and subject to taxation; but that said board of equalization refused to allow the said protest, or to strike the said 1,500 head of cattle in

excess of the number owned by him from the assessment roll, but allowed the assessment as made by the assessor to stand, and levied a tax upon the same, which tax was levied upon the 1,500 head of cattle in excess of the number of cattle owned by plaintiff, and which amounted to the sum of \$462.65, and which said sum was subsequently demanded of plaintiff by the defendant, and paid, as aforesaid, under protest. The plaintiff then says that, at the time he paid said sum, he gave notice to the defendant that he would bring suit to recover the sum of \$462.65; that this action was brought under section 4024, Political Code of Montana, for the purpose of collecting said sum, charged with being illegally demanded of and paid by plaintiff to the defendant under protest.

Defendant demurred to the complaint on the grounds: First. "That the court has no jurisdiction of the subject of the action." Second. "That the complaint does not state facts sufficient to constitute a cause of action." Third. "That said complaint is ambiguous and uncertain in this: It cannot be understood how or in what manner plaintiff's claim of protest was made. It cannot be determined what particular act or acts of plaintiff constituted or is relied on for a protest."

The demurrer was overruled, and defendant, electing to stand upon his demurrer, refused to further plead or answer, whereupon judgment was rendered for plaintiff, in accordance with the prayer in his complaint. From the judgment, this appeal is prosecuted.

C. B. Nolan, E. J. Conger, Smith & Word, and W. S. Barbour, for Appellant.

PEMBERTON, C. J.—Section 3782, Political Code, is as follows: "No reduction must be made in the valuation of property unless the party affected thereby, or his agent, makes and files with the board (board of equalization) a written application therefor, verified by his oath, showing the facts upon which it is claimed such reduction should be made." This section requires, as a condition precedent to the reduction of the valuation of property, that the party affected thereby, or

claiming a reduction, or his agent, shall file a written application therefor with the board of equalization, verified by his oath, showing the facts upon which such reduction is claimed. Before the plaintiff could be entitled to relief in any action, his complaint should show a compliance with this essential condition precedent. In any action, before he would be entitled to relief, the plaintiff would surely be required to prove that he had made this application in writing, under oath, as required by said section of the Code. If it be essential to prove it, it must follow as a natural consequence that it is necessary for plaintiff to allege it in his complaint. There is no such allegation in the complaint, and on account of this omission the complaint is bad, and the general demurrer thereto should have been sustained.

The jurisdiction of the court is attacked by the demurrer. It is not necessary to pass upon this question. But the question arises as to whether the complaint does not show such an illegal assessment as brings this case under exception No. 1 of section 4023, instead of giving plaintiff a right of action under sections 4024 and 4025 of the Political Code. And, if so, is the case not governed and determinable by *Hopkins v. City of Butte*, 16 Mont. 103, 40 Pac. 171?

There is a question raised as to the constitutionality of the law sought to be invoked by plaintiff in this case. If it were necessary to treat this question, we would hesitate to do so in the imperfect manner in which it is presented. The appellant discusses the question but gingerly in his brief. The respondent does not argue it at all, by brief or otherwise. We do not feel called upon to go into the treatment of such grave and important questions, even when compelled to do so, without the aid of thorough argument by counsel.

On account of the error of the district court in overruling the demurrer to the complaint, the judgment is reversed, and the cause remanded, with instructions to sustain the demurrer.

Reversed.

HUNT and BUCK, JJ., concur.

METLEN, RESPONDENT, v. SHANNON, COUNTY TREASURER, APPELLANT.

[Submitted April 6, 1897. Decided April 26, 1897.]

Appeal from District Court, Beaverhead County. Frank Showers, Judge.

ACTION by D. E. Metlen against J. G. Shannon, treasurer of Beaverhead county, to recover taxes paid. Judgment for plaintiff and defendant appeals. Reversed.

C. B. Nolan, E. J. Conger, Smith & Word and W. S. Barbour, for Appellant.

PER CURIAM.—The appeal in this case presents substantially the identical questions involved in *Barrett v. Shannon, ante*, 48 Pac. 746. On the authority of that case the judgment in this action is reversed and cause remanded, with directions to sustain the defendant's demurrer to plaintiff's complaint.

Reversed.

**YELLOWSTONE NATIONAL BANK, RESPONDENT, v.
GAGNON, APPELLANT.**

Submitted April 6, 1897. Decided April 26, 1897.]

Negotiable Paper—Pledgee—Bona Fide Purchaser.

NEGOTIABLE PAPER—Pledgee.—The endorsee of negotiable paper, who takes the same before maturity as collateral security for a pre-existing debt of the payee, is to the extent of his claim a purchaser in good faith and is not affected by equities between the parties of which he had no notice.

SAME.—Where, however, the debt is less than the amount named in the collateral note, the pledgee is protected against equities between the original parties, only to the extent of the debt for which the collateral was given.

Appeal from District Court, Yellowstone County. George B. Milburn, Judge.

ACTION by the Yellowstone National Bank of Billings, a corporation, against E. H. Gagnon. From a judgment in favor of plaintiff, defendant appeals. **Reversed.**

Statement of the case by the justice delivering the opinion.

The plaintiff and respondent bank sued the defendant and appellant to recover upon three promissory notes made by the defendant. One of the notes was dated April 25, 1895, for the sum of \$750. Another note was dated October 9, 1894, was due one year after date, and made to the order of J. J. Nickey, for \$2,392.75. The complaint alleged that Nickey, the payee named in the note, before maturity, duly indorsed, assigned, and delivered the said note to the plaintiff, who was at the time of the commencement of this suit the holder and owner thereof. The third note was a joint and several one for \$500, made by F. H. Nickey and the defendant. The plaintiff demanded judgment against the defendant for the amount of the three promissory notes.

The defendant filed a special and general demurrer, which was overruled. The defendant then answered, admitting the execution of the note for \$2,392.75, and admitting its de-

livery to Nickey, as alleged in the complaint, but set up that the plaintiff was not the owner or holder thereof, except as set forth in the answer. It is then alleged: "That the said J. J. Nickey, as this defendant is informed and believes, at the time he delivered said note to the plaintiff, was indebted to the plaintiff in the sum of twelve hundred dollars, with interest then accrued thereon, which indebtedness was evidenced by a promissory note of the said Nickey, which the plaintiff held against said Nickey; and that to secure the payment of said promissory note of \$1,200, held by the plaintiff against said Nickey, the said Nickey indorsed and delivered to and pledged the said note of this defendant for the said sum of \$2,392.75 to said plaintiff, as collateral security, and not otherwise; and that the same was taken by the plaintiff as collateral security for the said note of \$1,200 of the said Nickey, and for no other purpose or use; and that, as this defendant is informed and believes, the said Nickey was not indebted to the plaintiff at the time of the commencement of this action in any other or greater sum than the said \$1,200, with the accrued interest thereon, as evidenced by the said promissory note, for which the said note of this defendant to said Nickey was pledged as collateral security as aforesaid, or otherwise.

Further answering the complaint, the defendant alleges that, at the time said note was made and delivered by this defendant to said Nickey, the defendant and said Nickey were co-partners in certain mining and other interests; and that said co-partnership still exists; and that no settlement thereof has been made between the defendant and said Nickey; and that the defendant has a good and valid defense against said note of \$2,392.75 to the extent of about \$1,200; and that, therefore, this plaintiff is not entitled to recover from this defendant, on said alleged second cause of action, only the amount of said \$1,200 note of said Nickey, with the interest accrued thereon."

No replication was filed. The plaintiff bank moved for judgment on the pleadings for the amount claimed in the complaint, on the ground that the answer did not state a defense

to any cause of action in the complaint. This motion was granted by the court, and judgment entered in favor of plaintiff, and against the defendant, for \$4,493.25, together with costs. The appeal of the defendant is from the judgment.

O. F. Goddard, for Appellant.

Gib S. Lane, for Respondent.

HUNT, J.—In considering the question presented by this appeal, it must be remembered throughout that the single note over which this controversy arises—that is, the note for \$2,392.75—was indorsed to the plaintiff by Nickey simply as collateral security for a debt of \$1,200, due the bank by Nickey. It is upon this note that the plaintiff maintains a right to recover for the face thereof unconditionally and in all events, without reference to the debt of Nickey intended to be secured thereby.

Much space in the brief and argument of the respondent's counsel is devoted to supporting the proposition that an indorsee of a negotiable promissory note, taking the note in good faith, as collateral security for an antecedent debt, and with no other consideration, is entitled to be regarded as a holder of such paper for value, and consequently unaffected by an equitable and valid defense of the maker against the payee.

But we do not understand that the appellant disputes that general proposition of law. Ever since the decision of the supreme court of the United States in the case of *Railroad Co. v. National Bank*, 102 U. S. 14, reaffirming the doctrine established by that court in *Swift v. Tyson*, 16 Pet. 1, and reviewing the English and American authorities at length, it may be affirmed as a result of the best cases that the transfer of negotiable paper before maturity as collateral for a pre-existing debt merely, without other circumstances, "if the paper be so indorsed that the holder becomes a party to the instrument, although the transfer is without express agreement by the creditor for indulgence," is within the usual course

of commercial business, as much as would be its transfer in payment of such debt. "In either case," said Justice Harlan, "the *bona fide* holder is unaffected by equities or defenses between prior parties, of which he had no notice."

Applying the principle just stated to the pleadings in the case before us, we find that the indorsement of the note by Nickey to the bank, as a collateral security for his own pre-existing debt, was upon a sufficiently valuable consideration for the transfer to bring the case within the rule which protects the holder of negotiable paper, and entitles the bank to the full benefit of the security. And we now are brought to the real question raised by the appellant, but which has to some extent been lost sight of by the respondent.

The facts pleaded show that Nickey only owed the bank \$1,200 and interest at the time he transferred the Gagnon note for \$2,392.75, to it as collateral security, and that the defendant, who was the original maker of the note, has an equitable claim against Nickey, growing out of some partnership relations that existed between them.

The question, therefore, is not whether the bank is a *bona fide* holder at all, but to what extent is it to be regarded as a *bona fide* holder for value, and how much may it recover upon such note delivered to it as collateral security only?

The degree of protection to which the bank is justly entitled is, in our opinion, controlled by the amount of the pre-existing debt of the payee of the note to the bank, or the extent of the obligation to secure which the note was passed as collateral.

Daniel on Negotiable Instruments (section 832a) expresses the rule in this language:

"When it appears that the bill or note was acquired by the holder as collateral security for a debt, and he is deemed entitled to recover upon it, he is still limited to the amount of the debt which it secures, if there be a valid defense against his transferror being regarded as, at all events, a *bona fide* holder, and entitled to stand upon a better footing only *pro tanto*. Thus, such a holder could recover against an accom-

modation party no more than the consideration actually advanced; but, in the absence of proof, he will be deemed to have advanced the full amount of the paper."

The pledgee of the note is fully protected against loss by its right to recover the full amount of the debt due to it by the payee. Its rights are preserved, which is all it may reasonably ask.

This general principle was recognized over 50 years ago in the case of *Williams v. Smith*, 2 Hill 301, where the court after declaring that a person to whom a promissory note was transferred before due as collateral security for indorsements to be made to him, which were afterwards made, and who took the note without notice of a defense existing against it in the hands of the person from whom he received it, was entitled to be treated as a *bona fide* holder, decided, however, that, inasmuch as the person who took the note received it as collateral security, he could recover no more than the amount remaining due on the principal demand.

This doctrine was followed in the early case of *Valette v. Mason*, 1 Smith (Ind.) 89. That was an action in assumpsit by an assignee against the makers of a promissory note. The defendants pleaded that the note was assigned to the plaintiff only as collateral security for certain money lent and advanced to the payee. It was decided, as in the case of *Williams v. Smith*, cited above, that the holder of commercial paper assigned as collateral security is entitled to be regarded as a holder for a valuable consideration, and is not bound by equities existing between the payee and the makers which would interfere with the collection of his debt, but that in a suit on such paper the holder is not entitled to recover more than the debt actually due to him, if any part of it has been previously paid, or if there is no good consideration as between the original parties.

Chief Justice Shaw, in *Stoddard v. Kimball*, 6 Cush. 469, briefly discussed the question of what amount the holder of a promissory note, as indorsee, had a right to recover of the maker where the note was negotiated to the plaintiff as col-

lateral security for a debt due to him. He was of the opinion that, the plaintiff having taken the note to secure a pre-existing debt of a less amount, was holder for value in his own right only to the amount of the debt due him.

In *Youns v. Lee*, 18 Barb. 187, it was also decided that the *bona fide* purchaser and holder of a note was entitled to recover the amount paid for it, "with interest, and no more."

Colebrooke on Collateral Securities (section 92) cites several of the cases just referred to, and deduces the following text from them :

"Where negotiable promissory notes, pledged as collateral security, are accommodation paper, without consideration, or subject to an equitable set-off, or, in cases of misappropriation, as between the makers and payees and indorsers thereof, and the collateral securities are of greater amount than the loan represented by the principal evidence of indebtedness, the recovery of the pledgee against the makers upon an action thereon is limited to the amount of his advances. The pledgee in such cases of fraud is a holder for value of the collateral note, as against the makers of such paper, to the extent only of his interest at the time he acquires the title or has notice of the defenses to it."

This doctrine is also followed in *Bank v. Barnett*, 27 La. Ann. 177.

In *Fisher v. Fisher*, 98 Mass. 303, the court affirmed the case of *Stoddard v. Kimball*, heretofore cited, and held that where the evidence established the fact that the plaintiffs received the note from the holder before its maturity, without any knowledge of the circumstances under which the defendants had delivered it to the payee, or the purpose for which the latter delivered it to the holder, and where it was shown that it was held by the plaintiffs as collateral security for a valid debt due from the holder to them, plaintiffs, as *bona fide* holders for value and without notice, could recover "to the extent of their debt for which the note was pledged as collateral security."

In *Huff v. Wagner*, 63 Barb. 215, the court sustained the

principle that "a *bona fide* holder of commercial paper, to which, as between the maker and payee, there is a good defense, is entitled to be protected only to the extent of the value which he has paid." The court there further said :

"The protection of the holder for value in such cases, as in other cases where the law protects *bona fide* purchasers against latent claims, is founded upon the idea of protecting such *bona fide* purchasers for value against any possible loss. And this is the precise reason why a *bona fide* holder of such paper, which has been transferred to him to secure an antecedent debt, cannot recover against the party who has been defrauded, namely, that he has lost nothing by his reliance upon the face of the paper."

The supreme court of New Jersey, in *Duncan v. Gilbert*, 29 N. J. Law 521, followed a like doctrine, and said : "It is certainly true that the holders of accommodation paper assigned as collateral security, can recover against the accommodation maker and indorser no more than the consideration actually advanced."

In a very able review of the decisions upon the question of whether a person situated as was the plaintiff in the case at bar is entitled to the position of a holder of negotiable paper for value, and therefore not affected by the defense of want of consideration to the maker, the court of appeals of Maryland, through Chief Justice Alvey, also decided that all the plaintiff in such a case can recover is the amount due on the debt for which the note has been taken as collateral security. "In such case," said the chief justice, "while the plaintiff is entitled to be treated as a holder for value, it is only so to the extent necessary to protect the debts intended to be secured." (*Maitland v. Bank*, 40 Md. 540.)

Tiedeman on Commercial Paper (section 304) states that, where the pledge of a negotiable note is made for the purpose of securing the payment of a debt, the better rule is that the pledgee can recover the whole of the face value of the note, and hold the balance over and above the amount of his own claim as a trustee for the pledgor. It would seem, therefore,

as if he took a different view of the law from that taken by Daniel, although he expressly states in a subsequent part of his text that the pledgee in such a case is a *bona fide* holder only in respect to the amount of his claim against the pledgor; and, if there be a good defense to an action on the collateral by the pledgor, the recovery of the pledgee is limited to the amount of his claim against the pledgor. But we think that, if the pledgee is to be regarded in such a case (as he undoubtedly should be) as a *bona fide* holder only to the amount of his claim against the pledgor, and if he be limited in his recovery to the amount of his claim, it is most reasonable that the controversy over the balance be litigated by those directly interested, and that ordinarily the pledgee is not to be held as a trustee for the pledgor.

We are aware that there is a contradiction of opinion as to the attitude of the pledgee who seeks to recover the full amount of the collateral where such amount is in excess of the debt secured to him; but we are content to adopt the rule sustained by the decisions already cited, which limit his recovery to the amount due to him. In addition to the cases above cited, we may include *Steere v. Benson*, 2 Ill. App. 560, and *Bank v. Hemingray*, 34 Ohio St. 381.

A recent case upon this subject is that of *Farmers' State Bank v. Blevins*, 46 Kan. 536, 26 Pac. 1044. There the court stated the question substantially as follows:

In an action against the maker of the notes which had been transferred before maturity to an innocent and *bona fide* holder as collateral security for an indebtedness existing between the payee of such notes and the indorsee, is the indorsee entitled to recover against the maker to the full amount of such collateral notes, where such amount exceeds the indebtedness which they were transferred to secure, without regard to any defenses that may exist between the original parties to such notes, or is in such case the right of the plaintiff to recover limited to the amount of the principal debt? In that case, as in the one before us, equitable defenses were made by the pleadings; and it appeared that there was a controversy be-

tween the maker and the payee of the notes, by which it appeared that the paper was subject to equitable set-offs between the maker and payee. The court answered the question by holding "that the doctrine that the pledgee cannot recover more than the amount of the debt of the pledgor is in accord with natural justice," and that, while it hesitated to state that as a rule, yet it did not think that any other rule ought to be applied without great caution. We are impressed with the reasoning in the Kansas case, and believe it correct in principle, as well as more practical, and well founded by the several decisions relied upon in the opinion of that court and the additional authorities above referred to by us.

There is another point made by the supreme court of Kansas in their decision which is applicable in this case as well. We think that the payee of the note, Nickey, ought to have been made a party to this litigation. Although the bank, under the views that we have taken of the law applicable to its rights, really has no interest in the controversy between Nickey and Gagnon, yet it would be eminently proper that the whole controversy be settled in this one action, and that the rights of all parties be determined. As was said by the supreme court of Kansas in the case above cited: "At the commencement of this action to recover on the notes as pledgee, the bank ought to have made Brady a party. He was the payee of the notes sued upon. He had transferred them by indorsement to the bank, who claims to be an innocent holder for value. Even after Blevins filed his answer, setting up his various defenses as against Brady, and the knowledge of the bank of these equitable defenses, the bank, for protection against Brady, ought to have made Brady a party, as it now insists upon a recovery for the full amount of the notes; and yet it is shown that Brady's pre-existing indebtedness to the bank is less than the face of the notes and interest. As Brady was not a party then, and is not now, he will not be bound by the decision of this court on the question presented."

We think the case at bar is one where the court might properly order the payee of the note to be made a party, and

that in the further conduct of the case this ought to be done, provided the pleadings remain as they are.

It follows, therefore, that the motion for judgment on the pleadings was improperly granted. The judgment is therefore reversed, and the cause is remanded to the district court, with direction to overrule said motion, and to proceed according to the views expressed herein.

Reversed and Remanded.

PEMBERTON, C. J., and BUCK, J., concur.

HARRINGTON, RESPONDENT, v. BUTTE & BOSTON MINING COMPANY ET AL., APPELLANTS.

[Submitted April 1, 1897. Decided April 26, 1897.]

New Trial—Conflict in Evidence—Burden of Proof—Pleading—Evidence—Cross-Examination—Res Gestae.

NEW TRIAL—Conflict.—Where the evidence is conflicting, an order denying a new trial will not be reversed on the ground that the evidence does not justify the verdict.

ENDORSEE OF CHECK—Good Faith—Burden of Proof.—In action against the maker of a check brought by endorsee, the burden is upon the plaintiff to prove good faith, according to the rule laid down in *Rositer v. Loeber*, 18 Mont. 372.

SAME—Pleading.—It is not necessary to allege in the complaint that the check was bought in good faith by the endorsee.

SAME.—Where the answer alleges that the check was fraudulently procured by the endorsee, the issue is formed by sufficient denials in the replication.

SAME—Evidence—Cross-Examination.—In an action by the endorsee of a check against the maker and the payee, the answer alleged that the check was obtained without consideration and by false and fraudulent practices, and transferred to plaintiff without consideration and for the purpose of defeating the defendant's defense; on direct examination plaintiff testified that he had had some business transaction with "I," the payee of the note; on cross-examination the witness was asked if he had not gambled in his own saloon and won several hundred dollars from the payee. *Held*, error to sustain an objection to the question on the ground that it was immaterial.

SAME—Res Gestae—Conspiracy.—In such an action, the declaration of the payee of the note, made a few hours after his transfer of the same, and stating that he had obtained it by gambling, and that he endorsed it so that the money could be obtained on it for him, is admissible in evidence, although not made in the presence of his endorsee, as it is part of the *res gestae* and tends to show a conspiracy.

SAME—Instructions.—In such an action, an instruction to the effect that it is admitted that the check was "duly endorsed" by the payee, is misleading, as the jury might infer that the check was endorsed in a lawful manner.

SAME.—In such an action, where there is evidence tending to show that plaintiff had reason to suspect that the check was improperly obtained, an instruction which confines the jury to the question of plaintiff's actual knowledge of fraud, is improper.

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Appeal from District Court, Silver Bow County. J. J. McHatton, Judge.

ACTION by Phil J. Harrington against the Butte & Boston Mining Company, John A. Leggat, and others. There was judgment on a verdict for plaintiff. A motion for a new trial was denied, and defendants appeal. Reversed.

Statement of the case by the justice delivering the opinion.

The general nature of this controversy is stated in the first instruction of the trial court, which reads as follows: "The plaintiff in this cause sues the defendants upon a check given by the defendant Butte & Boston Mining Company, payable to John A. Leggat, and by said Leggat endorsed to the defendant Wearth, and by said Wearth endorsed to the plaintiff, Harrington. It is alleged by the plaintiff that he purchased the said check from the defendant Wearth, paying the face value thereof, and that upon presentation to the First National Bank of Butte, upon which the check was drawn, the payment thereof was refused.

"The defendants Butte & Boston Mining Company and John A. Leggat answer that the said Wearth obtained the same without consideration, and by false and fraudulent and deceitful practices, and that the same was transferred to the plaintiff, Harrington, without consideration, and for the purpose of defeating said defendants Butte & Boston Mining Company and Leggat in any defense that they might set up against the enforcement of the check."

The facts, from respondent's standpoint, were substantially as follows: On the night of the 15th and 16th of February, 1895, in the Lynch saloon, in Butte, Leggat, while under the influence of liquor,—to what extent, the evidence is conflicting,—engaged in a game of cards with Wearth, a comparative stranger, whom he encountered there. The game was played in the presence of a constant companion of Wearth,—one Donovan. The result of it was that Leggat lost about all the cash he had with him, and in addition thereto a check for

\$2,500. At about 9 o'clock in the morning of the 16th of February, Wearth took this check to another drinking saloon near by, and caused its proprietor, Harrington, to be aroused from bed for the purpose of getting it cashed. Wearth was a fireman or boiler engineer, accustomed to earn, when he worked, about \$4 a day, but for several months had been out of work. These facts were known to Harrington. Wearth had been a frequenter of the latter's saloon, and had run up a bill there (extending over a period of several months) of \$80 for "whisky, cigars, playing cards, and having drinks, and one thing and another." Harrington knew Leggat, was familiar with his signature, and admits that, as written on the check, it was different from his usual signature. Harrington says that when Wearth presented the check to him, and requested him to deduct the amount he owed and give him the remainder in cash, he cashed the check, without any question as to how it came into Wearth's possession. He only asked, "Did you see Mr. Leggat sign this?" to which the reply was, "Yes." Wearth, according to Harrington, was paid \$1,750 before the banks of the city opened, as was their custom, at 10 o'clock a. m., and the remainder, less the bill of \$80, just after the banks opened, from money obtained from a bank by Harrington's barkeeper, who had been sent to cash other checks in Harrington's possession, but not the one in controversy. Harrington states that, shortly after paying Wearth in full, he learned from Donovan that payment of the check had been stopped at the banks of the city. He says that he thereupon went to a bank to obtain payment of this check in controversy, which was refused, or (he does not remember exactly the order of events) he proceeded to the Lynch saloon, where he found Leggat and Wearth. He testifies: "I went after Lynch (the proprietor, who was present also), and asked him if he could get them together. I said, 'You might get this thing settled for a few hundred dollars, and I can't afford to be out of the money.'"

The testimony was conflicting in a great many particulars. Lynch testified in behalf of defendants that Harrington came

into his saloon with Wearth before 10 o'clock, and only claimed to him then that he had paid \$1,750 on the check.

Instruction No. 9 given by the court is as follows:

"You are further instructed that it is admitted by the pleadings in this action that the defendant Leggat duly endorsed the said check in blank to the defendant John A. Wearth on or about the 16th day of February, 1895."

Instruction No. 11 given by the court reads as follows:

"You are further instructed that if you find from the evidence in this case that on or about the 16th day of February, 1895, the defendant John A. Leggat endorsed the check sued upon in this action in blank to the defendant John Wearth, and that thereafter the said John Wearth endorsed and transferred the said check to the plaintiff in this action for value, and that, at the time that plaintiff procured the endorsement of the same for value by the said Wearth, he had no notice of the manner in which the said Wearth procured the said check, or any notice of any defense thereto on the part of the defendant Leggat, or of any other defendant in this action; and if you further find from the evidence that the plaintiff is the owner and holder of the said check, for value, without notice of the said defenses, or any of them, and that the same has not been paid; and if you further find from the evidence that the plaintiff presented the said check for payment, and that payment of the same was refused,—you should find a verdict in plaintiff's favor, and against all the defendants herein, for the sum which he paid therefor or thereon, with interest thereon at the rate of ten per cent. per annum from the 16th day of February, 1895."

Instruction No. 12 given by the court is as follows:

"You are instructed that if you find from the evidence in this case that the defendant Wearth procured the check sued upon from the defendant Leggat as a wager or bet upon a game, or any gambling proposition, and that thereafter the said defendant Wearth sold and transferred the said check to this plaintiff for value; and if you further find from the evidence that, at the time plaintiff purchased the said check

from the defendant Wearth, it was endorsed by the defendant Leggat and also by the defendant Wearth, and that plaintiff, having no knowledge of the manner in which the said Wearth procured the same from the said Leggat, purchased the same from the said Wearth in the ordinary course of business, and in good faith, and for a valuable consideration,—you should find a verdict in plaintiff's favor, and against all the defendants herein, for the amount of the face value of the said check, with interest thereon from February 16, 1895, if you find that he paid face value therefor, and, if not, then for such amount as you may find he paid for it, if you find he paid value therefor."

The trial resulted in a verdict for the plaintiff, and this appeal is from an order denying a motion for a new trial, and from the judgment.

Forbis & Forbis, for Appellants.

John W. Cotter, for Respondent.

BUCK, J.—It appears from the record that there were many suspicious contradictions and evasions in the evidence given by Harrington, the plaintiff, and Wearth and Donavan, who were his main witnesses. These it is needless to enumerate. But, regarding Harrington's explanation of his participation in this transaction in the most favorable light to himself, we should not hesitate to set aside the verdict on the evidence, were it not for the rule that, where there is a conflict in the evidence on the trial, an appellate court should not trench upon the province of the lower court and its jury.

By a mere question, no doubt, Harrington could have ascertained how Wearth obtained possession of the check, and the total lack of consideration therefor, as between himself and Leggat. As a man of ordinary business prudence, should he not have endeavored to obtain this knowledge before paying out such a large amount of money to a man whose financial standing was of so dubious a character as Wearth's? Could he not have waited until the banks opened before paying Wearth the \$1,750 he claims to have paid before 10 o'clock

that morning? His failure to ask any questions, the unusual signature of Leggat, Wearth's financial condition, Wearth's haste to have the check cashed, and the fact that, in order to save a bill of \$80, he was willing to risk the loss of \$2,420, all indicate a most unusual line of conduct, so far as he is concerned, and are hardly compatible either with ordinary business prudence or even common honesty. But our decision must depend on other considerations than the sufficiency of the evidence to justify the verdict.

It is assigned as error that the pleadings do not support the judgment. Appellants' counsel urge that upon the authority of *Thamling v. Duffey*, 14 Mont. 567, 37 Pac. 363, the burden of proof was upon plaintiff, under the existing conditions of the case, to establish his good faith in the purchase of the check, and that he should have pleaded his good faith in the complaint or replication.

The lower court properly instructed the jury as to the burden of proof, in accordance with the rule laid down in *Thamling v. Duffey*, *supra*. Modified in *Rossiter v. Loeber*, 18 Mont., 372.

It is true that the complaint does not aver good faith on the part of the plaintiff, but until the plea of fraud was filed, such an allegation in the complaint would have been unnecessary.

Even, however, if it was necessary for the plaintiff to plead good faith, the averments of the replication sufficiently meet any such requirement. It denies any fraud or collusion, and alleges that the plaintiff purchased the check for its face value in the due course of business, and without any knowledge or information at the time of any defense to it.

During the cross-examination of Harrington he testified: "I had had transactions with Mr. Leggat before. I had cashed his checks frequently, and I believe he paid me a bill of \$6 at one time. I have not had any other transactions with him, that I remember, though there might have been others." This question was then asked him: "Had you not in your own saloon gambled with Leggat, and won several hundred dollars from him?"

The question was objected to as not cross-examination, and immaterial. The objection was sustained, and an exception noted.

It is true, as a general rule, that a defendant should not be permitted to make out his case on cross-examination, and that he should be confined therein to matters brought out on the direct examination. If a defendant could make out his case on cross-examination, he might employ leading questions for the purpose. It often happens, however, that no boundary line can readily be drawn between a question put directly on the theory of making out a positive defense, regardless of what has been testified to on the direct examination, and a question asked with a view only to have explained, negatived or modified what has been stated by a witness on his direct examination. Hence no little discretionary power is vested in the trial court in its control of the scope of cross-examination. The orderly conduct of the trial demands this. (See *Neil v. Thorn*, 88 N. Y. 270, and *Thornton v. Hook*, 36 Cal. 223.)

The general rule should not be rigidly adhered to, unless the distinction as to what is pertinent cross-examination, and what is an attempt to make out a defense independently of the direct examination, is clear. The purpose of this rule is for the marshaling of the evidence only, and it can never be properly invoked for the exclusion of any evidence that is material or competent. If the distinction is not clear, the counsel cross-examining a witness may, with the court's permission, make the witness his own, or else may wait until the proper time arrives for making out his defense, and then put the questions the propriety of which was doubtful on the cross-examination.

We think the question to which the objection was sustained should have been allowed, in so far as the materiality of the answer to it was concerned. The answer might have been material as tending to shed light on whether Harrington had reason to doubt the *bona fides* of Leggat's indorsement, and the consideration for the same, when Wearth presented the check to him. If Harrington knew that Leggat gambled in

saloons, that knowledge was a circumstance for the jury to consider in determining his good faith.

The question was objected to both as being immaterial and not cross-examination. If the court had excluded it solely on the ground that it was not proper cross-examination, we would uphold its ruling, because of its discretionary power in respect to controlling cross-examination. But we cannot tell whether it did or not, under the double objection made. Even on cross-examination, however, it would have been proper to have allowed it, and immediately thereafter Harrington was properly enough allowed to be cross examined as to Leggat's getting drunk at times. The question was pertinent as to the extent of the acquaintance Harrington had with Leggat.

Lynch testified in behalf of the appellants that he had gone to the different banks in the city before they opened, and stopped payment of the check in controversy, and that, upon his return before the time of the opening of the banks, Harrington and Wearth had together entered his saloon. He said: "Just after I got back to my place, Harrington and Wearth came in there. I told Wearth that I wanted to see him, and I took him into the back room, and asked him about Leggat's check; and he said he won it from him, playing cards."

Objection was made to the conversation because it was had without the hearing of Harrington, and the objection was sustained.

Again, the following question was put to Lynch as to what occurred at the same time: "What did Harrington say about it?" and he answered: "I called Wearth back into the room, and told him he had better give me back the check, or give it back to Leggat, and he said: 'I have not got the check, Ed. I gave it to Mr. Harrington, and he is going to have it cashed for me.'"

This latter testimony was stricken out, on the objection that it was not responsive to the question and was incompetent.

We think that both these rulings were erroneous. On the theory that Lynch was telling the truth when he stated that Harrington, accompanied by Wearth, came into his saloon be-

fore the banks opened, and only claimed to have paid \$1,750 on the check (which contradicts Harrington's testimony as to the payment of any money to Wearth after the opening of the banks at 10 o'clock), this testimony was admissible as tending to establish collusion and a conspiracy between Wearth and Harrington. Between the time of the payment of the \$1,750 to Wearth (which, according to Harrington, was some time after 9 o'clock) and the coming of himself and Wearth into Lynch's saloon (before 10 o'clock, according to Lynch's testimony), the interval would necessarily have been very brief; and if Harrington before 10 o'clock only claimed to Lynch to have paid \$1,750 on the check, the conspiracy, if there was one, was still in progress. In this view, both as a part of the *res gestae*, and as a declaration of one of the conspirators against another, the evidence was competent.

But respondent's counsel urges, even if this evidence were competent, the last answer was properly stricken out, because it was not responsive to the question which brought it forth.

We cannot agree with this last contention. Under the circumstances, competent evidence should not have been stricken out, even though it was there improperly from a merely formal point of view.

We think that the giving of instruction No. 9 was prejudicial error. It might readily have conveyed to the jury the idea that Leggat duly (that is, in a lawful manner) indorsed the check to Wearth. The answer denied that Leggat had "duly indorsed" the check to Wearth. True, the denial that the check was duly indorsed, considered by itself, would be a denial of a legal conclusion only. But the gist of the issue in the case was the legality, under the facts, of the indorsement.

Respondent's counsel says in his brief: "We may admit that the instruction was drawn and given by an oversight, and admit that the answer attempted to deny the indorsement of the check by the defendant Leggat to Wearth. However, * * * upon the witness stand the defendant Leggat admits that it is his indorsement, and the mere fact of a mistake in the instruction that it was admitted by the pleadings in the

action, instead of stating that it was admitted by the defendant in his testimony, we submit, is not sufficient to justify a reversal of the case, as it is not prejudicial error."

We cannot agree with this. It is true, Leggat admitted in his testimony that the signature was his, but he stated that he was too drunk to know what he was doing when he signed his name.

Objection is also made to instructions Nos. 11 and 12. We think the first is objectionable in two respects: It might readily have conveyed to the jury the impression that, if Harrington had no actual notice of the manner in which the check had been obtained by Wearth, then he was acting in good faith. It also overlooked the fact that, if Harrington had paid only \$1,750 on the check before he learned that it was obtained in gambling, he was nevertheless, under its terms, even if he paid the remainder after such knowledge, entitled to recover whatever he paid on the check.

Instruction No. 12 is also objectionable in the last aforesaid point of view. We do not think the other instructions given properly cured the defects in these instructions 11 and 12. The judgment is reversed, and the cause is remanded, with directions to the lower court to grant a new trial.

Reversed and Remanded.

PEMBERTON, C. J., and HUNT, J., concur.

WILLOUGHBY, RESPONDENT, v. REYNOLDS, APPELLANT.

[Submitted April 12, 1897. Decided April 26, 1897.]

Assignment for Benefit of Creditors—Power of Sale—Validity.

An assignment for the benefit of creditors which provides that the assignee may sell "for cash or credit," is void as to attacking creditors.

Appeal from District Court, Silver Bow County. William O. Speer, Judge.

ACTION by W. A. Willoughby, assignee of Luciano Guerra, against S. J. Reynolds, sheriff of Silver Bow county. Judgment for plaintiff. Defendant appeals. Reversed.

Statement of the case by the justice delivering the opinion.

This is an action to recover possession of personal property. It appears that on the 28th day of June, 1895, Luciano Guerra made an assignment of his stock of goods and merchandise by deed of assignment to the plaintiff for the benefit of his creditors. Plaintiff immediately took possession of the stock of goods as such assignee. On the following day the defendant, who was the sheriff of Silver Bow county, levied upon and took possession of said stock of goods under a writ of attachment issued out of the district court of said county in a suit wherein P. J. Brophy was plaintiff and said Guerra was defendant. On the same day plaintiff brought this suit, and replevied the goods.

The answer of defendant admits the assignment and taking by him of the goods under the writ of attachment, and alleges the assignment to be void for the reason that the deed contains a provision allowing the assignee "to sell and dispose of the said personal estate, and to collect the said choses in action, using a reasonable discretion as to the times and modes

of selling and disposing of said estate, as it respects making sales for cash or on credit." There was no replication.

The case was tried without a jury on an agreed statement of facts. Judgment for plaintiff was rendered by the court. Defendant appeals.

John Lindsay and Clinton & Lamb, for appellant.

PEMBERTON, C. J.—*Rosenstein v. Coleman*, 18 Mont. 459, 45 Pac. 1081, decided by this court on the 4th day of August, 1895, involves the same question presented here, and is decisive of this case. In that case we held that such a deed of assignment was void.

Upon the authority of that decision the judgment in this case is reversed, and the cause remanded, with direction to the district court to render judgment for the defendant.

Reversed.

HUNT and BUCK, JJ., concur.

LEWIS, RESPONDENT, v. LINDLEY, APPELLANT.

[Submitted March 24, 1897. Decided May 8, 1897.]

"A," the holder of a first mortgage, and "B," the holder of a second mortgage on real estate, entered into an agreement whereby the mortgages were cancelled and a new note and mortgage were given to "B" for the entire indebtedness, and "B" gave his note to "A" for the amount due him, secured by the new note and mortgage as collateral; thereafter an agreement was made by the terms of which the mortgage and note to "B" were returned and cancelled, the real estate was conveyed to "B," who agreed that the property should remain as security for "B's" debt to "A," and if he could not borrow the money on a note and mortgage to pay this debt, he would execute a mortgage to "A" as security therefor. Held, that upon the transfer to "B" a constructive trust was raised in behalf of "A," and that "B" held the title to the property subject to the equitable lien of "A."

SAME—*Purchaser from Trustee—Bona Fides—Burden of Proof.*—A wife who purchases from her husband real estate which is subject to an equitable lien, takes the property subject thereto unless she is a purchaser in good faith and without notice of the lien; and the burden is upon her to show good faith and want of notice.

Appeal from District Court, Gallatin County. F. K. Armstrong, Judge.

ACTION by Thomas Lewis against Joseph M. Lindley, and Rachel M. Lindley to establish and enforce an equitable lien on land. From a decree for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Statement of the case by the justice delivering the opinion.

Appeal from a judgment and an order overruling defendants' motion for a new trial.

The allegations of the complaint substantially are that the defendants and appellants are husband and wife; that on September 12, 1888, one Susan E. Rouse owned a large amount of real estate, described in the complaint, situate in the county of Gallatin, Montana; that on said 12th day of September, 1888, said Susan E. Rouse and her husband executed to one George Nichols their promissory note for \$5,500, due in five years after date, with interest, and to secure the payment of said promissory note the Rouses executed a mortgage on the real estate referred to; that said mortgage was the first lien upon said real estate, and was duly filed for record on September 13, 1888; that on July 7, 1890, this plaintiff and respondent, Lewis, purchased the said promissory note and mortgage, which said note was transferred by Nichols to the plaintiff, and the mortgage securing the note was duly assigned to plaintiff by Nichols; that about August 17, 1891, the appellant Joseph M. Lindley was the owner and holder of certain other notes made and delivered to him by the Rouses, aggregating \$11,600, which notes were also secured by second mortgage upon the property which the Rouses had theretofore mortgaged to Nichols, and which mortgage Nichols had assigned to this plaintiff and respondent, Lewis; that the defendant Joseph M. Lindley, to more fully secure his claim and notes against the Rouses, and at the same time to preserve the lien that Lewis had upon the real estate referred to for the security of his note, made an agreement with Lewis by which it was understood and agreed that plaintiff, Lewis, should release and cancel the mortgage securing the note of \$5,500 in consideration of the defendant Joseph M. Lindley executing to plaintiff

iff, Lewis, his note for \$5,500, and giving to the plaintiff, Lewis, as collateral security therefor, a note for \$19,659, made by the Rouses to the defendant Joseph M. Lindley, which said note should include the entire sum due from the Rouses to the plaintiff upon the \$5,500 note, and which was to be secured by first mortgage to be executed by the Rouses to the defendant Joseph M. Lindley upon the property already referred to and described in the complaint; that according to this agreement the Rouses made and delivered their note for \$19,659, dated August 17, 1891, to Joseph M. Lindley, due on or before August 17, 1893, which said note included the amount due the respondent, Lewis, and the said Joseph M. Lindley by the Rouses, and to secure the payment of said note the Rouses executed a mortgage upon the aforesaid property to the defendant Joseph M. Lindley, which mortgage was recorded on August 24, 1891; that defendant Lindley, in accordance with the terms of the agreement just referred to, made and delivered the said note for \$5,500 to the plaintiff, Lewis, and at the same time transferred to him the note of the Rouses for \$19,659 as collateral security for the \$5,500 note, and thereupon plaintiff cancelled the mortgage securing the note for \$5,500; that prior to August 17, 1893, the defendant Lindley paid the interest on the said \$5,500 note and \$1,400 of the principal thereof, and that on August 17, 1893, there was still due on the said note \$4,100; that on said August 17, 1893, Joseph M. Lindley executed his note to this plaintiff, Lewis, for \$4,100, in renewal of the balance due upon said \$5,500 note, the last-mentioned note being due one year after date; that the plaintiff still owns the said note, and that nothing has been paid thereon except \$213.50, paid November 7, 1894; that it was agreed between plaintiff, Lewis, and the defendant Joseph M. Lindley at the time of the execution of the \$4,100 note just referred to, that the note for \$19,659, secured by mortgage and endorsed by Lindley to Lewis, should continue and remain, as theretofore, in the hands of plaintiff, Lewis, as collateral security for the payment of said note of

\$4,100, and the note for \$19,659 did remain in plaintiff's possession as collateral for the payment of said \$4,100 note until surrendered to the defendant Joseph M. Lindley for purposes hereinafter specified; that about September 28, 1894, the defendant Joseph M. Lindley represented to the plaintiff, Lewis, that he (Lindley) was about to effect a settlement and adjustment of the \$19,659 note due by the Rouses to him, the said Lindley, and, to avoid foreclosure and sheriff's sale, he, the defendant Lindley, had agreed with the Rouses that they were to make to him (Lindley) a warranty deed for the property described in their mortgage securing said note, upon the condition that Joseph M. Lindley would surrender to them the said note of \$19,659, and cancel the mortgage securing the same; that defendant Lindley agreed with the plaintiff at that time that, in consideration of Lewis surrendering to him (Lindley), for delivery to the said Rouses, the said \$19,659 note held by him as collateral, as aforesaid, he (Lindley) could and would cause to be executed to himself—that is, Joseph M. Lindley—a warranty deed from the Rouses, conveying to him all the property described in the said mortgage, and immediately after such conveyance by the Rouses he (Lindley) would liquidate and pay the \$4,100 note, with interest, or, in default thereof, would execute to this plaintiff, Lewis, a mortgage upon the property so conveyed to him (Lindley) by the Rouses as security for the said \$4,100 note, and cause the said mortgage so to be executed, to be executed and signed by the defendant Rachel M. Lindley, and that said property should continue to be security to the plaintiff, Lewis, for his debt; that pursuant to the terms of this agreement last mentioned, and relying upon the representations and agreements of the defendant Joseph M. Lindley, and without any intention of releasing or waiving the lien that Lewis, the plaintiff, had on the property described in the mortgage, he (Lewis), on September 28, 1894, surrendered to Joseph M. Lindley the \$19,659 note; that on September 27, 1894, the Rouses made and delivered to Joseph M. Lindley their warranty deed conveying to him all the real estate described in the mortgage

heretofore referred to, excepting about fourteen acres thereof, and that about the same day Lindley surrendered and transferred to the Rouses the \$19,659 note in consideration of the deed, and afterwards, about November 15, 1894, Lindley released and cancelled the mortgage securing the said \$19,659 note,—all of which, plaintiff alleges, was done by Lindley in violation of his said agreement with plaintiff, Lewis, and with the intention of defrauding and cheating Lewis out of his said debt and his security therefor upon the said lands described in the mortgage given to secure the \$19,659 note.

Plaintiff further alleges that about October 25, 1894, the defendant Joseph M. Lindley, disregarding his promises and agreement made as aforesaid, together with his wife, Rachel M. Lindley, for the purpose of defrauding and cheating plaintiff out of his debt due him on the \$4,100 note, and his just lien as security therefor against the real estate described in the mortgage securing the \$19,659 note, and without any consideration therefor, and with full knowledge on the part of both defendants of the debt of \$4,100 and of the lien as security therefor, conveyed all the real estate included in the mortgage, excepting fourteen acres, omitted as heretofore mentioned, together with all other real estate owned by the said Joseph M. Lindley, to one B. F. Osborne, and the said Osborne on the same day reconveyed all of said property so conveyed to him to this defendant Rachel M. Lindley, wife of Joseph M. Lindley, without any consideration therefor, and for the purpose of cheating and defrauding the creditors of Joseph M. Lindley, and especially this plaintiff, and that the said Osborne and both of the defendants intended to cheat the creditors of Joseph M. Lindley; that during the time which elapsed between the surrender of the \$19,659 note by this plaintiff, Lewis, to the said Joseph M. Lindley, and the execution and delivery of the deeds to Mrs. Lindley, and both before and after the making of the conveyances to Osborne and by Osborne to Mrs. Lindley, the said defendant Joseph M. Lindley represented to this plaintiff, Lewis, that he expected to and would pay the \$4,100 note if he could secure the money by mortgage

upon the realty described in the said \$19,659 mortgage, and that, if he failed to borrow said money, he would execute a mortgage to this plaintiff to secure the said \$4,100 note, and that he did pay during the said time the sum of \$213.50 to plaintiff, and that plaintiff relied upon his representations and statements made during said time and at the time of the surrender of said note as aforesaid, and believed the same to be true, until November 17, 1894, when he accidentally discovered the conveyances to Osborne by the defendants, and that of Osborne to Mrs. Lindley, and that said discovery was the first knowledge of said conveyances, or of the intentions of said Lindley, which came to plaintiff; that immediately upon said discovery he demanded of Joseph M. Lindley the payment of the \$4,100 note, or that he execute and cause to be executed to the plaintiff a mortgage upon the realty described in the \$19,659 mortgage, pursuant to the agreement between plaintiff and the defendant Joseph M. Lindley as hereinbefore set forth, but that Lindley failed to comply with the demand; that plaintiff also demanded of Rachel M. Lindley that she join her husband in the execution of the mortgage to plaintiff, or otherwise secure the note for \$4,100, pursuant to the terms of the agreement, but that she refused; and that Joseph M. Lindley has no other property than this real estate subject to execution, and is insolvent.

The plaintiff asked for a judgment—First, for \$1,100 and interest due on the said note, and for attorney's fees provided for in the note; second, that the court set aside the conveyances from Joseph M. and Rachel M. Lindley to Osborne, and from Osborne to Mrs. Lindley, and that the property be declared subject to the lien of the judgment or decree rendered in this suit; third, that plaintiff be decreed to have an equitable lien to the amount of his judgment and costs against the property of Joseph M. Lindley, described in the mortgage executed to him by the Rouses to secure the \$19,659 note; fourth, that the satisfaction of the mortgage made by the Rouses to Lindley to secure the \$19,659 note be vacated, and that the mortgage be held to be valid for the benefit of plaintiff, Lewis, and be

declared a lien prior to the lien of the defendants or all persons claiming through them, and that the mortgage be foreclosed, and the equity of redemption of defendants be barred; and, fifth, that the usual order relating to the foreclosure of real estate mortgages be made, and a deficiency judgment be docketed, and for further relief.

Defendant Rachel M. Lindley answered by denying on information and belief that the plaintiff, Lewis, about September 28, 1894, surrendered to her husband the \$19,659 note pursuant to any agreement, as pleaded by the plaintiff, or that when the plaintiff delivered the said note to her husband he did so without intending to release his lien of the mortgage, or that when the release of said mortgage for \$19,695 was made it was in violation of any agreement between her husband and plaintiff, Lewis, or that when the said acts were done it was with the intention on the part of her husband of cheating or defrauding plaintiff out of his debt or his security therefor.

She then sets up that about February 1, 1882, she loaned her husband \$3,200, and in January, 1884, loaned him \$3,500 more, both of which said sums were to be repaid to her by her husband upon her demand, with interest, and that the contracts for repayment of said sums were in writing, but were not in her possession at the time of filing her answer; that said sums of money so loaned to her by her husband was money which belonged to her before she married Lindley, and was claimed by her to be her separate property, but that her husband never paid the money back to her until about October 25, 1894, at which time there was due by her husband to her the full sum of \$17,754; that about October 25, 1894, it was agreed between her husband and Osborne, as trustee for them, and in consideration of her releasing all her claims against her husband on account of said sums of money so due her as above stated, and surrendering to him the evidences of said debts, that he would convey to her all the property described in the deed from Osborne to her, and certain other property; that she agreed to take the property conveyed in said deed in full

payment of the debts due to her by her husband, and that she took the same, and since October 25, 1894, the said property has been in her name as her separate property; that when she took the deed from Osborne she did not know, and not for a long time thereafter, of any claim or right of this plaintiff to the said property, or any part thereof, or any mortgage being thereon, or of any circumstances under which her husband had secured said property, or any part thereof; and that she did not take the same in any fraudulent manner, but in good faith, and for a valuable consideration, and without any notice of plaintiff's pretended right thereto.

Joseph M. Lindley also answered, and denied that at the time the \$19,659 note was surrendered to him by the plaintiff, Lewis, it was agreed that he would immediately, upon a conveyance being executed and delivered to him by the Rouses, pay the \$4,100 note, or that, in default of payment, he would execute a mortgage to plaintiff upon the property so conveyed to him by the Rouses; and denied that he ever agreed that any such mortgage should be executed by him and his wife, Mrs. Lindley. He then alleges that, when the \$19,659 note was surrendered to him, it was the intent of plaintiff, Lewis, to release to him (Lindley) all Lewis' claims to any of the property described in the mortgage securing said note, in consideration of which he (Lindley) agreed that he would either pay the note of \$4,100, or he would endeavor to raise the money on the property covered by the mortgage securing the \$19,659 note, or so much property as would be sufficient to raise said sum, and that plaintiff agreed to assist him in the negotiation of such a loan, and that it was further agreed that, if the money could not be paid by the defendant Lindley, or the loan negotiated, this defendant would secure the payment of said sum in some way satisfactory to the plaintiff, and that he (Lewis) would give him a reasonable time in which to pay said sum. Defendant Lindley denied that it was ever agreed that Lewis' lien upon the property described in the mortgage should be continued or be of any effect whatever, but alleges that the property was to be secured so that he could carry out

and effect a loan for the purpose of paying the debt to plaintiff, Lewis. Lindley denied that the transfer by the Rouses to him, or that the surrender of the \$19,659 note, or that the release of the mortgage securing said note, or that any of such acts were done in violation of any agreement with the plaintiff, or for any purpose of cheating or defrauding him out of his debt or security therefor upon the land described in the \$19,659 mortgage; denied that in disregard of his promises or agreement, or at all, or that for the purpose of cheating or defrauding his creditors, he executed the deed to Osborne, or that the transfer from Osborne to Rachel M. Lindley was in any way fraudulent, but alleges the facts to be that the conveyances were made to Osborne, and by Osborne to Mrs. Lindley, for the purpose of vesting in her the title of said real estate; and that the real consideration for said conveyances was money, separate property of Mrs. Lindley, which had been paid to him by her in a sum exceeding \$16,000, including interest, and that the transfers were made in good faith.

The replications denied the new matter in the answer. The case was tried to the court without a jury. The findings of fact conformed to the allegations of plaintiff's complaint generally, and it is unnecessary to incorporate them fully in this statement.

After making findings sustaining plaintiff's averments to the effect that plaintiff and defendant J. M. Lindley entered into a contract by which it was understood that the plaintiff should release and cancel the Nichols mortgage, in consideration of which Lindley would execute his note to plaintiff for \$5,500, and give to plaintiff as collateral security therefor the \$19,659 note made by the Rouses, the court also found that pursuant to said contract the \$19,659 note was delivered and endorsed to plaintiff as collateral, as averred in the complaint; that thereupon plaintiff, Lewis, released the Nichols note and mortgage securing the same.

It was further found that at the time of the execution and delivery by Lindley of the note of \$4,100 to plaintiff, it was agreed that the \$19,659 note secured by mortgage should-re-

main, as theretofore, in the hands of Lewis as collateral security for the \$4,100 note, and it did so remain in the hands of Lewis until September 28, 1894; that about September 28, 1894, Lindley represented to plaintiff that he had effected a settlement of the Rouse indebtedness, and that to avoid expenses of foreclosure of the mortgage to secure the \$19,659 note he (Lindley) had agreed with the Rouses that they should make a warranty deed to him for all the property described in the mortgage, except a small tract, upon condition that he (Lindley) would surrender to the Rouses their note of \$19,659, and cancel the mortgage; and that to finally perfect this settlement, and secure to himself the advantages, and get the deed for the property, it would be necessary for him to obtain from Lewis the said \$19,659 note; that Lewis at first objected, but it was finally agreed between them that, in consideration of plaintiff's surrendering to defendant Lindley, for delivery and surrender to the Rouses, the note then held by plaintiff as collateral security, plaintiff's lien on the real estate described in the said mortgage should be continued in force, and the property should continue to be security to plaintiff for his debt against Lindley, and Lindley could and would procure to be executed and delivered to himself a warranty deed from the Rouses conveying to him the real estate described in the \$19,659 mortgage, and that upon the execution and delivery to him of said deed Lindley would, if he could raise the money upon the security of said real estate, liquidate and discharge the said note of \$4,100 and interest, and on failure to raise the money for that purpose, would execute to plaintiff a mortgage on said property as security for said note, which mortgage should be as complete and perfect as that which Lewis then had; that pursuant to the terms of said agreement plaintiff, Lewis, on the same day, relying upon the representations and agreements of Lindley, and without any intention of releasing or waiving his lien upon the property described in the mortgage, surrendered to Lindley and gave up the promissory note for \$19,659 for purposes heretofore specified, and that about the same day the Rouses executed their deed to Lindley, con-

veying to him all the property described in the mortgage securing the \$19,659 note, except about fourteen acres thereof; and that on November 15, 1894, Lindley released the mortgage securing said \$19,659 note, but, except the payment of \$213.50, made November 7, 1894, Lindley has never paid the plaintiff.

The court also found that, for the purpose of defrauding the plaintiff out of his just debt, the transfers were made to Mrs. Lindley, through Osborne, and that at the time of the conveyance to Mrs. Lindley by Osborne, Mrs. Lindley had full knowledge of the debt of \$4,100 and interest due from her husband to Lewis, and of the plaintiff's lien upon the real estate described in the \$19,659 mortgage as security therefor. There was a finding also to the effect that in February, 1882, and in 1884, Mrs. Lindley had loaned the aggregate sum of \$6,700 to her husband, to be repaid to her by him on demand, but that she never demanded payment until after the surrender of the \$19,659 note by Lewis to Lindley, and that Lindley never paid anything to her until the Osborne transactions, and that no consideration passed from Mrs. Lindley to Lindley for the transfer to Osborne except the satisfaction of the old debts due by Joseph M. Lindley to Mrs. Lindley.

The court also found that frequently between the time of the surrender of the \$19,659 note on September 28, 1894, by Lewis to Lindley, and the transfer of the real estate to Mrs. Lindley on October 25, 1894, Lindley repeatedly told plaintiff that he would pay the \$4,100 note by borrowing money by mortgage upon the real estate, or, if he could not do so, he would execute a mortgage to Lewis, and he did during this period of time pay \$213.50 interest due on the note, and that plaintiff relied upon the promises of Lindley made at the time of the surrender of the \$19,659 note, and believed the same to be true, until November 17, 1894, when he accidentally learned of the Osborne transfers, and that immediately upon receiving this information he demanded of Lindley that he pay the note or execute a mortgage as had been agreed upon, and demanded of Mrs. Lindley that she join in a mortgage to secure the

note, but that both of them failed to respond, and that Lindley has no other property than this real estate.

As conclusions of law the court held that Lewis was entitled to a judgment against Lindley for \$4,100. and costs, and also to a decree subjecting the real estate described in the \$19,659 mortgage to the lien of said judgment, and that the indebtedness of Lindley to his wife was barred by the statute of limitations; that Mrs. Lindley was not a *bona fide* purchaser of the property without notice of the prior equity of plaintiff, and was not entitled to hold said property as such as against the equities of the plaintiff and his lien thereon for security of his debt of \$4,100; that plaintiff was entitled to a decree for the specific performance of the contract of September 28, 1894, requiring defendants to execute to him a mortgage upon the property deeded to the defendant Joseph M. Lindley by the Rouses; that plaintiff was entitled to an equitable lien upon the property conveyed to Lindley by the Rouses, and that such lien was prior to the title of defendant Rachel M. Lindley, which she took by virtue of the conveyance of October 25, 1894; that plaintiff was entitled to have the release and satisfaction of the Rouse mortgage vacated and annulled, and to have the mortgage reinstated in full force for the benefit of plaintiff, and that such mortgage was entitled to be declared a lien paramount to every lien of the defendants, and that the plaintiff was entitled to have the mortgage foreclosed and the property sold, or so much thereof as might be necessary to discharge the debt of plaintiff against Joseph M. Lindley of \$4,100 and interest and costs.

Toole & Wallace, for Appellants.

Hartman Bros. & Stewart, for Respondent.

HUNT, J.—Upon the trial of the case the respondent, Lewis, gave the following version of the circumstances under which he surrendered the \$19,659 note:

“On September 28, 1894, Mr. Lindley stated to me that he had finally made a settlement, or rather a compromise, with

Rouse, and he went on to tell me what it was, and said, 'I think that is better than a lawsuit, don't you?' I said, 'I don't know.' He said that they were working on the deed, but, in order to get that deed,—to get a deed for the property,—he would have to get the Rouse note of me. I said, 'What am I to do?' I said, 'That is my security.' He said, 'Yes, I know it is; but if you will let me have the note, so I can get a deed to the property, I will then raise the money, and pay you off, or I will give you a mortgage to the property.' I said to him, 'I would rather have the money, and I don't like to give up my security.' Then he said it looked to him that, once he had the property in his own name, he ought to be able to raise that amount of money on it at a less rate of interest. I said, 'If you can get it at all, you certainly ought to get it for less interest;' and he then said, 'If I can't raise the money, I will then give you a mortgage on the property, and your security will be just as good then as it is now.' I said to him: 'If you will do that, I will get the note, and give it to you. The note is in the bank. I will be down in half an hour, and bring it to your office,'—which I did, relying upon his word that he would raise the money, and pay me, or give me a mortgage on the property. I went down town to his office, and he was not in, and I went out on the sidewalk, and handed the note to him on the sidewalk in front of his office, and then I went home. There was nothing said at all about my waiving any lien whatever. He said that he had compromised with Rouse, and had agreed to let him have some acreage property and one little cottage, and that he could not perfect that without this note. He would have to have the note to turn over to Rouse as consideration for this deed of this property from Rouse to himself. He stated that he had made the compromise, and allowed him to reserve certain parts of the property included in the \$19,659 mortgage, to save the expense of foreclosure and sheriff's sale under the mortgage. We had no agreement that I was to relinquish any security I had on the property. The agreement was that, if I would surrender the note to him to get the deed from Mr.

Rouse, he would raise the money, and pay me, and, in case he failed to do so, he would then give me a mortgage, and that my security would continue and be just as good then as it was now. This mortgage was to be on the same property that was included in the \$19,659 mortgage given by Mr. and Mrs. Rouse to J. M. Lindley. I had the \$19,659 note in the bank, pinned to the \$4,100 note, with some other papers, for safe-keeping. I had a box in the bank."

The appellant Joseph M. Lindley gave substantially the following evidence upon the same matter:

"The contract and arrangement I made with Mr. Lewis when this \$19,659 note was surrendered in substance was that I was to receive a deed from Mr. Rouse and wife, and surrender his note for \$19,659, and that I was to make it satisfactory to him in some way. This was with Mr. Lewis. I don't know that there was any contract that I was to pay him, or give him a mortgage on this property which secured the \$19,659 note. The arrangement was that I was to secure the note in some way or get the money. He wanted the money. * * * I had frequent conversations with the plaintiff about the matters in controversy. We had a good many conversations; among other things, that he had surrendered all the security he had, and that my wife should sign the note. That was the substance of the last conversation. I know he said, 'I have surrendered all the security I have, and I want your wife to sign this note.' That is the note he held against me. He repeatedly said that he had surrendered all the security he had on the note. The demand he made was that my wife sign the note."

On cross-examination appellant testified:

"This demand that she sign the note with me was after I had deeded her the property; not before that. We had frequent conversations as to whether I would be able to pay the money, or have to give a mortgage. I don't remember of telling him on the 7th of November that I was afraid I would have to give that mortgage. Possibly I told him so. I don't know that I ever did. Still I guess it is so. He did not want

the mortgage. He would rather have his money. The original agreement was that he preferred the money to the mortgage. I have no distinct recollection of what was said at the time the note was surrendered. I was to give him a mortgage, or satisfy him in some way. I don't know that he asked that before he surrendered the note. Before he surrendered the note, I told him it would be necessary to have the note before I could get the deed, and that if he would do it I would either give him the money or give him a mortgage."

Now, when we scrutinize the facts as pleaded in the statement of the case given above, and the evidence of Lewis and Lindley, we find these essential facts:

On September 28, 1894, the defendant and appellant Joseph M. Lindley owed this respondent, Lewis, \$4,100, a balance due upon a debt which had been owing to Lewis since September, 1888; and from that last-mentioned date to September 28, 1894, the property involved in this controversy had been held by Lewis under a mortgage lien for the security of that debt. The debt was due, and the legal title to the property which had secured the debt was in persons by the name of Rouse, subject to Lewis' lien upon it. On September 28, 1894, there was a debt in favor of Mrs. Lindley against her husband for money loaned him ten and twelve years before. Prior to September 28, 1894, Mr. Lindley had made an agreement with the legal owners of the property which secured his debt to Lewis which was of advantage to him, but to perfect that contract it became necessary to put the evidence of Lewis' lien upon the realty into the possession of the Rouses, the holders of the legal title. In order to permit Lindley to take advantage of the benefit to accrue to him by the perfection of this transaction with the Rouses, the plaintiff surrendered to Lindley the evidence of his lien, upon the conditions that, in consideration of Lewis' surrendering to him (Lindley), for delivery and surrender to the Rouses, the \$19,659 note, plaintiff's lien should be continued, and remain security to plaintiff for his said debt of \$4,100, and, immediately upon the legal title being secured to said property in Lindley, he

would raise the money upon the security of the real estate, and pay the debt to Lewis; or, if he could not do that, he would execute to Lewis a mortgage on the realty as security for the note.

The testimony, therefore, satisfies us that the findings of the court in relation to the surrender, and the conditions attached thereto, of the \$19,659 note are amply sustained by the evidence.. Indeed, a reference to the statements of appellant Lindley confirms the view taken by the district judge, for Lindley's statements are not substantially at material variance with the account given by Lewis. He admits that the evidence of the lien of Lewis was to be relinquished to him (Lindley), and in consideration therefor he was to try and raise the money to pay Lewis by a mortgage on the property, and that Lewis was to assist him in effecting such a loan, and that, if the money could not be raised, he was to secure the plaintiff's debt in some way satisfactory to him; but that the property should be secured in his (Lindley's) hands, so that he could carry out and make the loan upon it for the purpose of paying the \$4,100 due to Lewis.

Furthermore, it is plain from the testimony that Lewis gave up the \$19,659 note to Lindley, and Lindley gave it to the Rouses in order to perfect the title in himself of the property embraced in the mortgage, and which was security for the lien held by Lewis; and that it was by reason of the surrender of the \$19,659 note that Lindley was enabled to and did procure the legal title to the property. But very soon after this was done, assuming that up to this time Lindley had been acting in good faith, and meant to be honest in his dealings towards Lewis, he conveyed all the property which had been so transferred to him by the Rouses, and all the other property which he owned, to his wife, to pay to her a stale claim, which was not alone invalid under the laws of Montana territory at the time it was contracted for, but the payment of which she never had demanded of him before, and which was not secured in any manner whatsoever, and besides was confessedly barred by the statute of limitations.

Under all of these conditions and circumstances we are led to inquire whether (1), there is an equity in Lewis' favor against Joseph M. Lindley which will be upheld against the Rouse property conveyed to Mrs. Lindley through Osborne; and (2), if there is, may it be enforced against the property as a prior lien to any interest conveyed to Mrs. Lindley by her husband through the Osborne transfer?

We think there is the equity, and it can be enforced. We believe it would be a fraud upon Lewis to deny him relief, and the rules of law and equity do not prevent a court from so finding.

The position of the appellant, as we understand it, is that no fiduciary relation existed between plaintiff and respondent, when respondent, Lewis, under the verbal arrangement, surrendered the \$19,659 note to the appellant J. M. Lindley; that no fraud or deceit is charged or proved to have existed on Lindley's part in the procurement of the note from Lewis; hence, that no resulting or constructive trust could have arisen, or did arise, under which Lewis could enforce the verbal agreement, without doing violence to the statute of frauds. (Fifth Division Compiled Statutes of 1887, § 217).

It must be remembered always that Lewis consented to the surrender of the evidence of his lien to enable Lindley to avail himself of the advantageous proposition made to him by the Rouses. He sought and obtained the confidence of Lewis to execute his plan. With faith in Lindley's honesty, and relying upon his promises to pay the debt due Lewis, or secure it by mortgage, Lewis surrendered the note, but without any intent to change his position as the holder of the first lien upon the property which had been embraced in the mortgage connected with the \$19,659 note. Lindley therefore assumed and took upon himself a fiduciary relation towards Lewis, in consideration of the benefits which he might obtain for himself by consummating his negotiations with the Rouses.

There are two familiar principles which should govern a court of equity in exercising its remedial jurisdiction, both of which become applicable in this case. One is, when one,

through the influence of a relationship of a fiduciary nature, acquires title to property or obtains an advantage which he should not conscientiously retain, in order to prevent the abuse of the confidence, equity will grant relief. Another is that the statute of frauds will not be permitted to be used as an instrument of fraud.

Within one of the divisions of trusts are the resulting and constructive species. Pomeroy, in his *Equity Jurisprudence* (section 155), speaks of both kinds as properly described by the generic term "implied trusts," and thus defines them:

"Resulting trusts arise where the legal title is disposed of or acquired, not fraudulently, or in the violation of any fiduciary duty, but the intent in theory of equity appears or is inferred or assumed from the terms of the disposition, or from the accompanying facts and circumstances, that the beneficial interest is not to go with the legal title. In such a case a trust 'results' in favor of the person for whom the equitable interest is thus assumed to have been intended, and whom equity deems to be the real owner. Constructive trusts are raised by equity for the purpose of working out right and justice, where there was no intention of the party to create such a relation, and often directly contrary to the intention of the one holding the legal title. All instances of constructive trust may be referred to what equity denominates 'fraud,' either actual or constructive, including acts or omissions in violation of fiduciary obligations. If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property, which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner."

Washburn on Real Property (volume 2, p. 520) says that, properly speaking, "constructive trusts are such as are raised by equity in respect to property which has been acquired by

fraud, or where, though acquired originally without fraud, it is against equity that it should be retained by him who holds the legal title."

Spence, the learned English writer on Equitable Jurisdiction, on star page 511, expressly includes in his definition of constructive trusts those arising where property has been fairly and properly acquired, but it is contrary to some principle of equity that it should be retained by the party in whom it is vested,—at least for his own benefit; and to exemplify his text he cites the case of *Dyer v. Dyer*, 2 Cox, Ch. 93, where Lord Chief Baron Eyre stated that, where a purchase is made by a man or by his directions, and with his own money, the conveyance being in fact taken in the name of another, the trust of the legal estate has been said to "result" to the man who advances the money. (See, also, Beach, Mod. Eq. Jur. § 226).

When these controlling rules are applied to the facts in the case at bar, and to the premises assumed by the learned counsel for the appellants, all those portions of his argument which proceed upon the hypothesis that Lindley did not acquire towards Lewis a relation of trust and confidence from the time of the agreement and the surrender of the note, fall, and with them go the citations to the cases which eliminate consideration of circumstances like those in this case; while, on the other hand, if we accept—as we do—the clearly established fact that there was a relationship of trust and confidence which Lindley violated, and that fraud is an element of the case, authorities are abundant in support of the view that Lindley held the legal title subject to Lewis' lien thereon. (*Reagan v. Hadley*, 57 Ind. 509; *Nickerson v. Meacham*, 14 Fed. 881).

"It is an established rule of equity that, where trust and confidence are reposed by one party in another, and such other accepts the confidence or trust, equity will convert him into a trustee whenever it is necessary to protect the interest of the party so confiding and do justice between them." (*Foot v. Foot*, 58 Barb. 262).

Indeed, we do not understand the learned counsel to contend

that, if a constructive trust did arise, equity will deny respondent relief; that is to say, he does not dispute the general rule that the creation of constructive trusts is not affected by the statute of frauds, because there is no evidence of intention to create a trust, for "where there is no evidence of intention it could not be expected that a declaration of intention in writing, properly signed, would be made or could be produced." (Perry, Trusts, § 124.)

Here, in our opinion, the effect of plaintiff's prayer is not to create a trust by parol in real property, under conditions not authorized by the statute, but to have the defendant Lindley declared a trustee *ex maleficio*, because of his conduct, and, as such trustee, holding the title to the property obtained by the Rouse deed, and conveyed to Mrs. Lindley, subject to the lien of plaintiff, Lewis. (Beach, Mod. Eq. Jur. §§ 227, 233).

Lindley has violated his agreement. He cannot cling to the results, yet deny its legal efficacy. His position was that of a trustee with relation to the property deeded to him by the Rouses, and which he claimed to own when he deeded to his wife.

Finally, we pass upon the attitude of Mrs. Lindley. It has been decided by this court in *Bank v. Gagnon*, 19 Mont. 402, 48 Pac. 762, that the transferee of negotiable paper as collateral for a pre-existing debt may be a *bona fide* holder under the rules of commercial law. The reason for the rule in such cases palpably lies in the interest of ordinary mercantile transactions; and, while authority is to be found generally in support of a like doctrine as applicable to the purchase of land, still, in such cases, whether an antecedent debt is a valuable consideration within the rule of a *bona fide* transaction, is not necessary to be considered in this case, and, until called upon to examine the many conflicting views, and to lay down a rule upon that point, we shall reserve our decision thereon.

But passing the contention that she paid a valuable consideration to her husband by giving him his notes, and assuming that she did, we still think that it was incumbent upon her to

establish her defense of a *bona fide* purchaser without notice of respondent's equity. "It is a universal rule that if a man purchases property of a trustee with notice of the trust, he shall be charged with the same trust in respect to the property as the trustee from whom he purchased." (Perry on Trusts, § 217).

Section 232, Fifth Division Compiled Statutes of 1887, pertaining to conveyances, provides:

"The provisions of this chapter shall not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor."

It is urged that, under the foregoing statute, the burden of proof to show such knowledge was upon the respondent plaintiff. We think otherwise.

The allegation of the complaint is that both Mr. and Mrs. Lindley had full knowledge of the \$4,100 note held by Lewis, and of the lien held by him as security therefor at the time of the conveyance by Lindley to Osborne and by Osborne to Mrs. Lindley. As part of her affirmative defense, Mrs. Lindley alleged that she took the deed from her husband in absolute good faith, and for a valuable consideration, and without notice of any claim or equity in plaintiff. Inasmuch as Mrs. Lindley is the person seeking, as against Lewis, whom her husband sought to defraud, the protection of a *bona fide* purchaser for value, without notice, from such fraudulent grantor, it was incumbent upon her to show good faith and want of notice.

The question of burden of proof in cases like this was presented to the supreme court of Oregon in *Weber v. Rothchild*, 15 Or. 385, 15 Pac. 650, and it was decided that, the plaintiff having shown the fraudulent intent and purpose of the grantor in a deed, could stop, and that the grantee was then required to prove that he paid value in order to protect his title. There the defendant Rothchild—like the defendant Mrs. Lindley in

this case—alleged facts in his answer tending to show that he was a *bona fide* purchaser for value, without notice, but no evidence was offered on those issues. It is to be observed here that Mrs. Lindley did not offer any evidence at all to sustain the averments of her answer that she did not know of the equity of this plaintiff, Lewis, or of the mortgage in existence which secured her husband's note to Lewis. The facts and the pleadings in the case at bar therefore are very similar to those stated in the opinion last cited, and bring the decision within the rule laid down by Judge Strahan that the plea of a *bona fide* purchase for value is an affirmative defense interposed by the defendant, and does not differ from other affirmative defense in respect to requiring the purchaser, who has the affirmative of the issue, to offer evidence to support it. (*Boone v. Chiles*, 10 Pet. 211.) The Oregon court applied the rule that, when a fact is peculiarly within the knowledge of a party, he must furnish the necessary evidence of such fact. This, we believe, is correct, and, on principle, where the facts go to show that a husband has executed a deed of property to his wife for the purpose of defrauding a creditor of his judgment lien, the grantee named in such an instrument and who relies on the defense that she is a *bona fide* purchaser for a valuable consideration without notice, must protect her title by showing that she purchased for a valuable consideration, and in good faith, without notice of prior equities. It is remarkable that the exact contents of the notes given by Mr. to Mrs. Lindley were not testified to by them,—the only persons who knew anything of them. It is strange, too, that Mrs. Lindley refrained altogether from swearing on the trial that she did not in fact know of the plaintiff's equity, or of the \$4,100 note, or of the history of the surrender of the \$19,659 note to her husband, and that Lindley did not say that he had not informed her. Surely, she knew whether she had knowledge of these circumstances and facts, and it was certainly incumbent upon her to testify to them as part of her affirmative defense.

The learned judge of the district court must have consid-

ered all these matters in applying the law to the facts, for he assigns Mrs. Lindley's failure to offer any evidence of lack of knowledge as a reason for his findings made that she was not a purchaser without notice, and that she had full notice and knowledge of the debt of her husband to Lewis, and his lien on the property at the time of the transfer of the same to her. We find nothing in section 232, Fifth Division of the Compiled Statutes 1887, heretofore referred to, to justify the argument that the burden of proof was upon the respondent. We think that after he had offered his evidence leading to the inference that the deed from the appellant Lindley to his wife was made with intent to defraud Lewis, the onus of proof in respect to no notice rested upon Mrs. Lindley. (*Zimmer v. Miller*, 64 Md. 296, 1 Atl. 858; *Nickerson v. Meacham*, 14 Fed. 881; *Callan v. Statham*, 23 How. 477.)

Finally, upon the whole case, all the equities are manifestly with the respondent, and the judgment of the district court must be affirmed.

Affirmed.

BUCK, J., concurs. PEMBERTON, C. J., not sitting.

STATE EX REL. PIERSON, RESPONDENT, v. MILLIS,
CHAIRMAN OF THE BOARD OF COUNTY COMMISSIONERS,
RESPONDENT.

[Submitted April 12, 1897. Decided April 24, 1897.]

*Appealable Order—Order Denying Retaxation of Costs—
Record on Appeal—Certificate of Clerk.*

APPEALABLE ORDER—Cost.—An appeal does not lie directly from an order denying a motion to retax costs; the appeal should be from the judgment.

RECORD ON APPEAL—Clerk's Certificate.—Under section 1739, Code of Civil Procedure, the certificate of the clerk to the record on appeal should state "that an undertaking on appeal in due form was properly filed."

Appeal from District Court, Carbon County. Frank Henry, Judge.

19	444
19	500
19	444
29	579
19	444
25	373
19	444
128	156
128	289
14	444
228	581

MANDAMUS on the relation of George W. Pierson against O. E. Millis, chairman of the board of county commissioners for Carbon county. Judgment was entered against defendant, who failed to appear, and from a special order thereafter made, denying his motion to reform said judgment and quash the alias execution, he appeals. Dismissed.

Statement of the case by the justice delivering the opinion.

It appears that a proceeding in mandamus was instituted in the district court of the Sixth judicial district in the name of the state at the relation of the county attorney of Carbon county to compel the appellant, who was chairman of the board of county commissioners of said county, to sign a warrant in payment of relator's official salary. Appellant was served with process, but failed to appear, and on July 10, 1895, judgment was rendered against him for the relief prayed for in the complaint and for the sum of \$11.70 costs. These costs were included in the judgment at the time it was signed. Execution for said costs was issued on the judgment on November 23, 1895. On December 13th a notice of motion and a motion, both in writing, were filed by appellant in said court, and upon appellant's application the execution was stayed pending the determination of the motion. The motion was as follows :

“Now comes the defendant in the above entitled action, and moves the court to reform the judgment herein by striking out the words and figures ‘eleven and 70-100 (\$11.70),’ for the reason that the records do not show that the memorandum of the costs was ever filed with the clerk of said court as required by law and that a copy of said bill or memorandum of costs was served upon the defendant as required by law; and to quash the alias execution herein, for the reason that the said execution directs the sheriff to make said sums claimed to be due on said judgment for costs out of the property of the said O. E. Millis personally, whereas the judgment is against O. E. Millis, chairman of the board of county commissioners for the county of Carbon, and hence the county is

responsible for the judgment, and not O. E. Millis; and for the reason that the execution recites that a judgment was rendered for eleven and 70-100 dollars damages, instead of eleven and 70-100 dollars costs; and that until this motion can be heard and determined by the court, that the judge thereof will order said alias execution, and all proceedings thereunder, stayed."

This motion was denied on February 17, 1896, and two days later a notice of appeal was filed, reciting that an appeal was taken from the special order made after final judgment.

The clerk's certificate in this transcript on appeal is as follows :

"[Title of court and cause.] I, H. E. Newkirk, clerk of the district court of the Sixth judicial district of the state of Montana, in and for the county of Carbon, do hereby certify as follows :

"(1) That the foregoing is a true and correct transcript and record of the proceedings pertaining to the motion to reform the judgment and quash the alias execution made and issued in the above-entitled action, and constitutes in full the papers used upon the hearing of said motion in this court.

"(2) That no memorandum of costs or disbursements has ever been filed in said cause, and that none has ever been filed with an acceptance of service of defendant or his attorney indorsed thereon.

"(3) That a good and sufficient undertaking on appeal was filed in said action by defendant or his attorney within the time allowed by law, to-wit, on the 21st day of February, A. D. 1896, and that such undertaking is now in the custodianship of this office.

"In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate written below. Dated May 22d, 1896. [Signed.] "

W. F. Meyer, for Appellant.

A. J. Campbell and George W. Pierson, for Respondent.

BUCK, J.—This purported appeal is from a special order made in the case after final judgment. *Rader v. Nottingham*, 2 Mont. 157, affirmed in *Orr v. Haskell*, *Id.* 350, holds that an order overruling a motion to retax costs is not appealable. These cases are cited with some apparent doubt in *Mining Co. v. Weinstein*, 7 Mont. 346, 17 Pac. 108, but without disapproval, and are also commented upon in *Ryan v. Maxey*, 15 Mont. 100, 38 Pac. 228, and *Bank v. Boyce*, 15 Mont. 175, 38 Pac. 829. They still, however, correctly enunciate the law of Montana, that, in order to review a ruling on a motion to retax costs, an appeal must be taken from the judgment. Even if the record in the present case was in proper form, which we shall presently show it is not, there being no appeal from the original judgment, we are not in a position to review that portion of the order attempted to be appealed from which pertains to the retaxation of the costs. It is true the motion is designated as one to reform the judgment, but in substance, that part of it is in the nature of a motion to retax costs in a judgment. Whether erroneously or not, these costs were included in the judgment at the time of its rendition. An objection to them could only be considered with the judgment before us on a direct appeal from the judgment itself.

This would leave for the consideration of this court, then, the question only of whether or not the lower court erred in refusing to quash the execution on some other ground than the costs contained in the judgment. But the record is in such a condition as to present absolutely nothing for review. The certificate of the clerk is fatally defective in itself. It fails to state, as required by section 1739, Code of Civil Procedure 1895, that an undertaking on appeal in due form was properly filed. See *Railroad Co. v. Anderson*, 77 Cal. 297, 19 Pac. 517, which construes section 953 of the present California Code of Civil Procedure,—a section identical with section 1739 of the Montana statutes. Said section 1739 is as follows :

“The copies provided for in the last three sections must be certified to be correct by the clerk or the attorneys, and must

be accompanied with a certificate of the clerk or attorneys that an undertaking on appeal in due form has been properly filed, or the stipulation of the parties waiving an undertaking."

Again, the district court clerk had no authority, under said section 1739, to certify what evidence, documentary or oral, the court had before it on the hearing of the motion. See *Baker v. Snyder*, 58 Cal. 617, and *Walsh v. Hutchings*, 60 Cal. 228.

Nor had he any authority to make the statement contained in the certificate that no memorandum of costs was ever filed. Section 1739 points out clearly what the certificate of the clerk shall be, and necessarily any statements contained in that certificate, except what the statute permits, are mere surplusage and meaningless on appeal.

The present Montana Code of Civil Procedure, like the California Code, contains no express provision for the authentication or identification on appeal of the evidence, oral or written, used on a hearing like the one had in this case in the lower court. Section 1739 is, as we have stated, section 953 of the California Code of Civil Procedure, which was in force when the cases of *Baker v. Snyder* and *Walsh v. Hutchings*, *supra*, were decided by the supreme court of California. That there must in some manner be a proper identification or authentication of the evidence in such a case, for the purpose of having it considered on appeal, is essentially necessary, however.

Hayne on New Trial and Appeal (section 264) discusses the question in detail, and cites California decisions, and the statutes of that state applicable to the inquiry are similar to those of Montana. There are also decisions of the supreme court of California on the subject later than those referred to in Mr. Hayne's work. See *Somers v. Somers*, 81 Cal. 608, 2 Pac. 967, and *White v. White*, 88 Cal. 429, 26 Pac. 236.

In *Somers v. Somers*, Mr. Justice Works, with whom concurred Mr. Justice Fox, declares that the proper and simplest way of bringing up such evidence for review on appeal is by means of a bill of exceptions; that is to say, of course, when the attorneys themselves do not certify as they are authorized

to do under said section 1739. We are inclined to agree with this view of the subject. After the case of *Somers v. Somers*, *supra*, was decided, the supreme court of California adopted a rule as follows: "In all cases of appeal to this court from orders of inferior courts, the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same in a bill of exceptions, except where another mode of authentication is provided by law."

The adoption of this rule simply carried out the views of Justices Works and Fox. Section 1156 of the Montana Code of Civil Procedure is sufficiently comprehensive to admit of this practice without a formal rule of this court. This is a digression, but the question of practice is so important a one that we deem it appropriate to intimate our view of the matter.

Returning to the record before us, we find that it consists of unidentified papers strung together, with nothing to suggest that they were used on the hearing of the appellant's motion; with nothing even to indicate that there was no other evidence before the court when it made the order complained of. Under these circumstances, every presumption is in favor of the correctness of the order of the lower court.

As early as 1874, Justice Knowles, in *Hibbard v. Tomlinson*, 2 Mont. 220, said: "A motion to retax costs should always be supported either by the records in the case, or by affidavits showing the illegal charges, or by a statement presenting them." In *Rader v. Nottingham*, *Id.* 127, this court said: "Holding, as we do, that we have no jurisdiction to determine the issue presented in this appeal, any judgment or order that we might render thereon would be void. Not desiring to cumber our records with a void judgment or order to vex the court below with, we must dismiss this appeal on our own motion."

On our own motion, therefore, we dismiss this appeal.

Dismissed.

PEMBERTON, C. J., and HUNT, J., concur.

19	450
27	535
19	450
28	6

19	450
30	58
30	834
19	450
29	888

MORSE, APPELLANT, v. COMMISSIONERS OF GRANITE COUNTY, RESPONDENTS.

[Submitted March 31, 1897. Decided April 26, 1897.]

County—Purchase from Commissioner—Effect of.

Where the sale of goods by a county commissioner to the county, is declared to be void under a statute, the title to the goods remains in the vendor; he may sell them, and his vendee may resell them to the county and recover the reasonable value thereof.

Appeal from District Court, Granite County. Theodore Brantley, Judge.

CLAIM by John W. Morse against the board of county commissioners of Granite county. Judgment of nonsuit. Plaintiff appeals. Reversed.

Statement of the case by the justice delivering the opinion.

It appears from the record in this case that the plaintiff, John W. Morse, presented the claim sued on in this action, and which is the subject of the litigation, to the county commissioners of Granite county, for allowance, which claim was allowed by the commissioners of said county. Thereafter Wingfield L. Brown, a taxpayer of Granite county, appealed from said allowance by the county commissioners to the district court, under the statute allowing any taxpayer to appeal from the action of the county commissioners in allowing a claim to the district court. The pleadings were oral. Morse claimed that he sold the goods and wares mentioned in the claim in litigation to the county commissioners of Granite county, and that they agreed to pay him the price named therefor.

From the statement on appeal in this case it appears that all of the items mentioned in the account in litigation were necessary for the proper furnishing and supplying of the courthouse and offices for the county officers of said county; that

Morse was the owner of the goods claimed to have been sold to the commissioners, and had a right to sell the same to the county; and that the prices claimed therefor were the reasonable value thereof. These allegations are not disputed; but it was claimed by Brown, who appealed from the allowance by the county commissioners, that the claim sued on in this case was and is identically the same claim which one G. B. Cain presented to the county commissioners of said county in 1893, and which was allowed to said Cain by the county commissioners, and from which allowance Brown appealed to the district court, and that on said appeal to the district court, it is alleged and claimed, the district court held and adjudicated that said allowance to Cain by the county commissioners of the said account was null and void, for the reason that said Cain was at the time a commissioner in and for said county of Granite, and that the contract of sale of the goods in dispute made by said Cain with the county was absolutely null and void. It was also claimed by Brown that the property, when purchased by the county commissioners for the county from Morse, was then, and had been since the alleged purchase by the county from Cain, the property of the county, and that, therefore, Cain had no right to sell the property to Morse.

The allegations that the property was the property of the county, and that Cain had no right to sell it to Morse, are denied by Morse.

The case was tried to a jury, and, at the close of Morse's testimony, counsel representing Brown in the district court moved for a nonsuit, on the grounds that—First, "it appears from the evidence that, during the year 1893, George B. Cain, commissioner, had sold to the county of Granite the identical property specified in the bill of John W. Morse, the claimant in this action, and had presented said bill for materials so furnished, which said bill, on appeal therefrom, duly presented on December 21, 1893, the above-entitled court pronounced an illegal and unjust claim against the county of Granite;" second, "that John W. Morse has failed to prove a valid, subsisting claim against said county."

This motion for a nonsuit was sustained by the court, and judgment entered in favor of Brown for his costs. From this judgment, and an order denying a new trial, the appeal is taken.

C. B. Nolan, Attorney General, and *Rodgers & Rodgers*, for Appellant.

W. L. Brown, *R. B. Smith* and *R. L. Word*, for Respondent.

PEMBERTON, C. J.—Notwithstanding the record shows that the case has been litigated with a great deal of zeal, and discloses ill feeling between the parties that has no place in a trial in the courts, still, when we strip the record of its rubbish and immaterial questions and contentions, we think the real issue involved is a simple one, and easy of solution.

It is conceded that Morse sold the property to the county; that the property was necessary for furnishing the courthouse and offices of the county; that the prices charged and the sum allowed Morse by the county commissioners were reasonable; that the property sold was reasonably worth the sum agreed to be paid and allowed.

Brown's principal, if not the only, objection on his appeal from the allowance of Morse's account by the commissioners, was that Cain, from whom Morse bought the property, had sold the same property to the county, and had his claim therefor allowed, long before he sold the property to Morse, and that, on an appeal by Brown to the district court, Cain's claim had been held and adjudicated to be null and void and illegal, for the reason that, under the statute, Cain, who was at the time a county commissioner, could not contract with the county. (Compiled Statutes 1887, Fifth Division, § 1110.)

Now, without commenting on this statute, let us inquire what was the effect of the judgment of the district court in holding and adjudicating Cain's claims against the county for this property "illegal and void." Counsel for respondents say that, by such adjudication, the property became the property

of the county, and that thereafter Cain had no authority to sell it to Morse or any one else. The district court held the contract of sale of the property between Cain and the county to be void, because prohibited by statute. This left the title to the property still in Cain. The court did not and could not, by such adjudication, confiscate Cain's property. If, after such adjudication by the district court, the county kept possession of the property, and appropriated it to its use, it could not avoid paying the reasonable value thereof, because the contract by which it obtained it was *ultra vires*, illegal, and void. This question is fully discussed by this court in *State ex rel. etc. v. Dickerman*, 16 Mont. 278, 40 Pac. 698.

And besides the admissions and concessions shown by the record, and set out in the statement of the case, Morse and Cain both swear that the sale of the property in litigation was made in good faith, and for a valuable consideration. On a motion for non-suit, as this court has frequently said, whatever the evidence tends to prove will be regarded as proved. (*Soyer v. Water Co.*, 15 Mont. 1, 37 Pac. 838; *McKay v. Railway Co.*, 13 Mont. 15, 31 Pac. 999; *Creek v. McManus*, 13 Mont. 152, 32 Pac. 675; *Mayer v. Carothers*, 14 Mont. 274, 36 Pac. 182; *Jensen v. Barbour*, 15 Mont. 582, 39 Pac. 906.)

We think it cannot be disputed that Morse's evidence tended at least to prove his cause of action.

The judgment and order appealed from are reversed, and the cause remanded for new trial in accordance with the views herein expressed.

Reversed and Remanded.

HUNT and BUCK, JJ., concur.

**BIG BLACKFOOT MILLING COMPANY, APPELLANT, v.
BLUE BIRD MINING COMPANY ET AL., RESPONDENTS.**

[Submitted April 12, 1897. Decided April 26, 1897.]

Mechanic's Lien—Pleading.

MECHANIC'S LIEN—Pleading.—A complaint in an action to foreclose a mechanic's lien upon several pieces of property not contiguous and not of similar character, which does not show that the material for which the lien is sought was furnished under one contract, or for which part of the property it was furnished, does not state facts sufficient to constitute a cause of action, and is uncertain and unintelligible, because it does not sufficiently designate the property for which the material was furnished.

Appeal from District Court, Silver Bow County. J. J. McHatton, Judge.

ACTION by the Big Blackfoot Milling Company against the Blue Bird Mining Company, Limited, and others, to foreclose a mechanic's lien. There was judgment on demurrer sustained to the complaint, and plaintiff appeals. Affirmed.

Statement of the case by the justice delivering the opinion.

This is a suit to foreclose a mechanic's lien. The account for which the plaintiff claims a lien is for lumber, timber, and building material, amounting in the aggregate to \$5,622.49, sold and delivered, as it is alleged by the plaintiff, to the defendant the Blue Bird Mining Company, Limited, during the year 1891, and up to March, 1892, from time to time, as appears from the account, and upon which it is alleged the defendant Blue Bird Mining Company, Limited, paid \$1,944.45 during the time aforesaid; this suit being for the balance of the account. The plaintiff claims a lien in this action, as set forth in his statement for a lien as well as in his complaint, on 29 separate quartz-mining claims; 160 acres of land; 5 town lots, which are in different blocks in the town of Rocker; a right of way over certain lots described in the complaint; a water right, also described; a lease-hold estate in a certain quartz mine; and other properties,—all situated in Silver Bow county.

The complaint alleges that all of said property, at the time plaintiff furnished the timber, lumber, and building materials set out in its account, was owned and operated by the defendant Blue Bird Mining Company, Limited, as a mine, and as one mining claim or plant, and that plaintiff furnished all of said material to said mining company on the credit of the whole property as a unit, and as one mining claim or plant.

There is no allegation in the complaint that any of the mining claims are contiguous to one another, or that the real estate other than the mining claims, or any part of it, is adjoining the mining claims, or any of them; nor is it alleged that the lumber and building materials mentioned in the complaint and account sued on were delivered under one contract; but it does appear from the account filed, as well as from the complaint, that said materials, lumber, and timber were delivered from time to time from December 4, 1891, up to March 1, 1892.

The defendants W. L. Hoge, M. B. Brownlee, F. E. Sargeant, and R. C. Chambers, under the firm name of Hoge, Brownlee & Co., filed a demurrer to the complaint on the grounds:

First. "That the said complaint does not state facts sufficient to constitute a cause of action."

Second. "That the said complaint is uncertain, unintelligible, and ambiguous, in this: that it does not appear upon what property the plaintiff is attempting to enforce its lien, and it also appears that the said lien is attempted to be enforced upon property far in excess of the amount of property permitted by law to be included in a lien."

The court sustained the demurrer to the complaint, and, the plaintiff having failed to amend its complaint, or further prosecute the case, judgment was rendered in favor of the defendants, dismissing plaintiff's suit, and for costs. From this judgment the plaintiff appeals.

T. C. Marshall and F. T. McBride, for Appellant.

Forbis & Forbis, for Respondents.

PEMBERTON, C. J.—The real question presented by this appeal is whether the complaint designates or specifies any particular acre or parcel of land with such certainty as would entitle it to a judgment enforcing a lien against it.

The appellant contends that the complaint describes the land so that it can be identified. We do not doubt that an officer might find all the land from the description given in the complaint. As shown in the statement, there is a large amount of land described in the complaint, amounting to nearly 800 acres, some of which consists of quartz-mining claims, 160 acres not shown to be mining ground (and presumably not mineral), several town lots shown to be in different blocks, a water right, a right of way over certain lots, and other property.

Now, then, the question is: Does the complaint show or designate any particular part of this large amount of land, of different kinds and character, upon which the building material was used, and which was improved or benefited thereby, against which a lien is sought, with such certainty as to enable or authorize the court under the law to enter judgment enforcing the lien?

Appellant contends that it is sufficient to describe all the property owned by the defendant Blue Bird Mining Company at the time the materials were furnished. The complaint alleges that all of the land described constituted one mining claim and plant, and that credit was given on the faith of the defendant Blue Bird Mining Company owning all of the property as a unit in its mining operations. In support of the contention that all of the property described in the complaint constituted but one mining claim or plant, counsel cites *Smelting Company v. Kemp*, 104 U. S., opinion, page 648, in which the court, by Mr. Justice Field, says: "Indeed, his claim may include as many adjoining locations as he can purchase, and the ground covered by all will constitute his mining claim, and be designated as such in the general understanding of miners, and the meaning they attach to the term."

The learned judge was here speaking of the number of

claims or adjoining locations that might be included in the patent when owned by one person or company. But this is a different question, we think, from the one at bar. Many authorities hold that, "where labor and materials are furnished under a single contract for buildings to be erected on contiguous lots owned by the same person, the liens will attach to all the lots, irrespective of the amount of material used on each." (Boisot on Mechanic's Liens, § 173, and cases cited in note.)

A large number of cases also hold that, where the lots are not contiguous, the lien is only on each lot for the value of the work or materials expended on that particular lot. (Id., and cases cited in note 55.)

Another line of respectable authorities holds that the lien can only be claimed for material furnished for the particular lot or tract of land upon which they were used, regardless of the question whether the lots are contiguous, and the materials for all were furnished under one contract. (2 Jones, Liens, §§ 1425, 1426, and authorities cited in the notes.)

But the complaint in this case does not show the different lots or tracts of land to be contiguous. The reverse is shown. There are 29 mining claims described in the complaint. None of them are alleged to be contiguous. One hundred and sixty acres of nonmineral land are described in the complaint. This land is not alleged to be contiguous to any other land included in the complaint. There are town lots enumerated in the complaint, shown to be in different blocks in the town of Rocker, and none of them alleged to be adjoining any other ground mentioned in the complaint. Nor does the complaint locate the water right, or right of way, or leasehold estate mentioned therein with reference to any other property described. Nor is it anywhere alleged that the building materials and lumber mentioned in the complaint were sold under one contract. In fact, the inference from an inspection of the account sued on is that the materials were not, and of necessity could not have been, covered by one contract. The account shows the materials or timbers sued on to be principally min-

ing timbers; that is, timbers used in developing mines. Now, it would be impossible for a mine operator ordinarily to tell in advance how much of such material he would need in developing a mine, or working it to any considerable extent. He would of necessity have to buy or contract for such materials from time to time as the necessities of the mine would require for the development thereof. So that we are unable to see how a contract in relation to furnishing timbers for developing a mine could be a long-continuing one.

This case is widely distinguished from *Steam Heating, etc. Company v. Wells*, 16 Mont. 65, 40 Pac. 78. In that case there was a finding of fact that the contract under which all the materials were furnished was one continuing contract. The statement of the case at bar shows a different state of facts. Contracting for timbers to extensively develop a mine is a very different thing from contracting for materials to build a house. In relation to the mine, the operator must ordinarily contract for his materials from time to time, as the necessities of the case demand; whereas in the case of a house the materials can readily be contracted for in advance at one time, as what is needed is known from the beginning.

So that, conceding that it is the law that a lien may be had on several adjoining lots and the buildings thereon, if owned by one person, and all the materials are contracted for under one contract, still we think the facts of this case do not bring it within this rule.

Whatever may be conceded to appellant as to what constitutes a claim, as announced in *Smelting Company v. Kemp*, *supra*, in that case the court did not hold that a party could unite, in his application for patent, quartz claims, nonmineral land, town lots, water rights, etc.

Counsel contends that, under the rule announced by this court in *Smith v. Mining Company*, 12 Mont. 524, 31 Pac. 72, the appellant is entitled to a lien in this case against all the ground described in the complaint.

In that case we held that the law limiting the operation of the mechanic's lien to one acre of ground, when outside of any

town or city, did not apply to a lode mining claim, because the law gave the lien on a quartz lode. *Smith v. Mining Company, supra*, does not go to the extent, and is not authority for the contention, that any number of noncontiguous lode claims, large tracts of nonmineral lands, town lots, water rights, etc., can all be included in one statement or proceeding to secure and enforce a mechanic's lien.

We do not assent to the claim of appellant that it could not designate any particular part of the large body of ground described in the complaint upon which the materials sued for were used. With the slightest effort, it seems to us, the appellant could have obtained some knowledge or information as to what particular lode claim, acre of ground, or town lot, the materials, or some part thereof, were used upon. But there is no attempt in the complaint to make such designation, or any excuse offered for not so doing. For this reason we think the complaint of plaintiff was bad for ambiguity and indefiniteness, as well as for not stating facts sufficient to entitle it to a lien, especially in this case, where the parties to the suit are not the same as those to the original contract. (2 Jones, Liens, § 1426, and authorities cited).

To hold otherwise would be to ignore entirely the general rule that the lien attaches only to the particular lot or tract on which the labor has been performed, or the improvements made, or building erected.

We see no error in the action of the district court in sustaining the demurrer to the complaint, for the reasons above stated. The judgment is affirmed.

Affirmed.

HUNT and BUCK, JJ., concur.

ON MOTION FOR REHEARING.

PER CURIAM.—Counsel for appellant, in his petition and argument for rehearing in this case, says that, in the opinion rendered therein, the court overlooked section 2131, Code of Civil Procedure, which provides that a mistake in the amount or description does not affect the validity of the lien.

The question is not involved. It was conceded in the argument of the case by counsel for the respondents that the description of the premises mentioned in the complaint was sufficient to identify them. But the point contended for by respondents was that there was no specification of any particular lot or parcel of land in the large body of land described in the complaint upon which a lien could be held to attach; that is to say, that no particular lot or parcel of the land was described as the premises on which the lumber sued for was used, with such particularity as to entitle plaintiff to a lien thereon. And for this reason the court below held the complaint bad on demurrer. We only decided that there was no error in this action of the lower court.

Counsel for appellant contends that this court passed upon the validity of the contract by which plaintiff furnished the lumber to the Blue Bird Mining Company, when its validity was not before this court.

In this counsel is clearly mistaken. We said nothing as to the validity of this contract. We simply referred to it to show that it is not similar to the contracts treated in the authorities and cases cited in our opinion. We did not even hold that a contract was essential to the right to claim and enforce a lien. This question is not involved in this case.

But whether the contract in this case be valid or invalid, or whatever the nature of the contract may be, it is our opinion that the complaint is bad, for the reasons stated in the opinion and restated herein. We think the petition for a rehearing is without merit.

From a careful consideration of the petition for a rehearing

in this case, we are impressed with the belief that counsel has not taken the trouble to study the opinion of the court sufficiently to ascertain what this court did treat and decide. We do not wish to restrict in any way the right to apply for a rehearing in any proper case, but we think we have a right to insist that petitions should only be presented in those cases where such proceeding is justified and based upon some reasonably good ground shown on the face of the petition. The petition should call the attention of the court to some error or oversight committed by it in treating and deciding the case, as shown by the record and opinion itself. Petitions for rehearing should only be resorted to in proper cases. The time of this court should not be taken up in considering petitions for rehearing that show no grounds therefor, and which show that counsel have not studied the opinion of the court sufficiently to determine what questions of fact or law have been treated or determined by the opinion sought to be reviewed. The practice hereby criticised has become so common as to amount to an abuse of the rule allowing petitions for rehearing, and, we think, justifies this animadversion.

The judgment rendered herein will not be disturbed.

Petition Denied.

ELLINGHOUSE ET AL., RESPONDENT, v. TAYLOR,
APPELLANT.

[Submitted April 2, 1897. Decided April 26, 1897.]

*Constitution—Construction—Eminent Domain—Right of Way
for Ditches.*

CONSTITUTION—*Construction.*—Section 15, article 3 of the constitution provides that "the use of all waters that are now appropriated or may hereafter be appropriated for sale, rental, distribution or other beneficial use, and the right of way over the lands of others for all ditches ——— necessarily used therewith shall be held to be a public use." *Held*, that the phrase "other beneficial use" includes other uses than such as are kindred to rental, sale or distribution.

SAME.—The use of water to cultivate a particular tract of land, is a public use, under section 15, article 3 of the constitution.

SAME—*Eminent Domain—Right of Way for Ditch.*—The law of March 6, 1891, which authorizes a proceeding to condemn a right of way over the lands of another for a ditch to be used for irrigating purposes, is not unconstitutional.

EMINENT DOMAIN—*Trespasser.*—The mere fact that plaintiffs had been trespassers upon defendant's land, does not deprive them of the right to condemn a right of way for a public use.

Appeal from District Court, Madison County. Frank Showers, Judge.

PROCEEDING by Frederick Ellinghouse and Elijah D. Marsh to condemn right of way for an irrigating ditch across the lands of Thomas T. Taylor. From a decree establishing such right of way, defendant appeals. *Affirmed.*

Statement of the case by the justice delivering the opinion.

Respondents (plaintiffs below) instituted a proceeding under the act of the state legislature approved March 6, 1891, for the purpose of condemning a right of way for an irrigating ditch across the land of appellant (defendant below).

The complaint averred the interest of plaintiffs in certain described lands, the appropriation of the water to be conveyed for the irrigation thereof, the necessity of the right of way for a ditch across defendant's land, and a failure on defendant's part to enter into an agreement as to the same. A demurrer to the complaint for failure to state a cause of action,

and for want of jurisdiction on the part of the court to entertain it because of the unconstitutionality of the law of 1891, was interposed and overruled.

The answer filed denied most of the material allegations of the complaint, pleaded the unconstitutionality of the statute of 1891, and set forth affirmatively that defendant's land would be seriously injured by the granting of the right of way; that the plaintiffs could convey water to their land without a ditch through defendant's land; and that the condemnation proceeding was not in good faith, but for the purpose of harassing defendant.

The replication denied the affirmative matter set forth in the answer. A trial was had, and the court, on the evidence, made an order granting the right of way, and appointing commissioners to assess damages. Upon the report of the commissioners filed, after denying a motion to set aside their findings, the court entered a decree in behalf of plaintiffs. The appeal is from the decree and the several orders incidental thereto. The record contains none of the evidence introduced.

W. A. Clark, for Appellant.

Lew L. Callaway, for Respondents.

BUCK, J.—Appellant's counsel states the main points he relies upon for a reversal of the judgment of the lower court substantially as follows:

“First. That the complaint failed to state facts sufficient to give jurisdiction, for the reason that it shows upon its face the right sought to be acquired is not a public use.

“Second. That the law of 1891 is unconstitutional, inasmuch as it permits a right of way for private use.

“Third. That the right to take private property for private use in the case of appropriations of water is not authorized by section 15, article 3 of the constitution of the state of Montana, providing that the use of all waters that are now appropriated, or may hereafter be appropriated, for sale,

rental, distribution, or other beneficial use, and the right of way over the lands of others for all ditches, drains, flumes, canals and aqueducts necessarily used in connection therewith, shall be held to be a public use. The term 'other beneficial use' makes it apply only to uses kindred to sale, rental or distribution; that is to say, the beneficial use must be something kindred to rental, sale or distribution, and applies to the appropriation and use of large quantities of water for public purposes, or to supply a large number of individuals, * * * but does not apply to appropriations and uses by private individuals for distinctly private purposes. That the scope of this section of the constitution is limited, rather than extended by the words 'other beneficial uses.' "

We cannot agree with this construction of section 15, article 3 of the constitution of Montana. The phrase "other beneficial use" clearly includes in the term "public use" the use of water for the purpose of irrigating a particular tract of agricultural land, or working a particular mine, as well as the use of water for irrigating a number of tracts of land, or working a number of mines owned by different persons. In California, whose constitutional provision on the subject of the use of water, it is insisted by appellant, is substantially the same as that of Montana, a much narrower interpretation of the term "public use" has been adhered to than we can agree with. In *Lorenz v. Jacob*, 63 Cal. 73, the supreme court of California held that: "The right of eminent domain is restricted to the taking of private property for public use. It cannot be exercised in favor of the the owners of mining claims, to enable them to obtain water for their own use in working such claims, though the intention may also be to supply water to others for mining and irrigating purposes."

And yet in the state of California no constitutional objection is urged against the construction of ditches and condemnation of rights of way therefor in order to distribute water to a number of owners of agricultural or mining lands. What real distinction is there, so far as the term "public use" is concerned, between the benefit that results to a state from the re-

clamation by artificial irrigation of 160 acres of agricultural land owned by one or two persons, and the reclamation by the same means of thousands of acres owned by many different persons living together in one subdivision of the state? We do not think there is any in principle. The reclamation of one small field by means of artificial irrigation promotes the development and adds to the taxable wealth of the state as well as the reclamation by the same means of a number of fields. The only difference is the extent of the benefit.

The constitutional provision of California, however, is not the same as that of Montana on the subject of the use of water. The former does not contain the phrase "other beneficial use." But, even if this phrase were not included in the Montana provision, we should not feel disposed to follow the California construction. It impresses us as narrow and retrogressive. Under this language in the constitution of each state, namely, "the appropriation of water for distribution," we think the courts of either state would be justified in declaring the use of water for one or two tracts of land or mines a "public use."

The term "public use," under the later and better line of authorities, is not limited to cases wherein persons or incorporated aggregations of persons, in consideration of the right of eminent domain conferred upon them by the state, have bound themselves to the direct discharge of a duty to the people at large, and from and in the discharge of which the people, individually and collectively, derive a direct benefit, and are directly interested; as, for instance, the reciprocal obligation incurred by common carriers in return for the right to engage in their business to transport passengers and freight without discrimination. A "public use" is far broader in scope. Persons have been allowed the right of eminent domain on the theory of a public use, in the construction of dams for the operation of grist and saw mills, in the reclamation of swamp lands, and in other similar instances that might be enumerated where the public had no direct interest in these operations, whose main end was mere private gain, and where the benefit to the people at large could result indirectly and incidentally

only from the increase of wealth and the development of natural resources.

The whole subject is very ably treated, and the pertinent authorities carefully collated, by Chief Justice Gooding in the case of *Oury v. Goodwin* (Ariz.) 26 Pac. 376. It is also discussed by Mr. Justice Hunt in the case of *Butte, Anaconda & Pacific Railway Co. v. Montana Union Railway Co.*, 16 Mont. 504, 41 Pac. 232.

In the last mentioned decision the conclusion we have reached in the premises is clearly foreshadowed. Hence we deem it unnecessary to go more fully into the subject. The public policy of the territory and the state of Montana has always been to encourage in every way the development of the minerals contained in its mountains, and the necessity for adding to its tilled acreage is manifest. This state is an arid country, and water is essential to the proper tillage of its scattered agricultural valleys. With all this in view, it was expressly declared in our state's constitution that the use of water by private individuals for the purpose of irrigating their lands should be a public use. The statute of 1891 regulating the manner in which rights of way for irrigating ditches should be acquired was enacted under the constitution in order to carry out the intention of its framers and the people who adopted it. Reference to the United States supreme court decisions cited in the cases *supra* will also prove that the constitution and the law of Montana do not violate the constitution of the United States. See, also, *Irrigation District v. Brauley* (Nov. 16, 1896), 17 Sup. Ct. 63.

The complaint alleges that the ditch for which a right of way was prayed had been originally constructed by plaintiffs in ignorance that a right of way was necessary, and that defendant, with knowledge of its construction, had made no objection at the time. The answer denies that it was so constructed. The appellant insists that, inasmuch as the complaint shows on its face that plaintiffs were originally trespassers upon his ground, for that reason also they were not entitled to a decree for a right of way.

If appellant sustained damage by reason of any trespass on his ground by plaintiffs, he has a remedy. But plaintiffs, by reason of an inadvertent trespass, should not be debarred from obtaining what the law entitles them to receive.

It is objected that the court and the commissioners appointed failed to find that the right of way sought to be acquired by plaintiffs was for a public use. The facts set forth in the complaint clearly show that such use was a public use within the purview of the constitution. Such a finding was unnecessary.

Other objections are made, but, as they involve a consideration of the evidence, which is not in the record, we cannot consider them. The judgment is affirmed.

Affirmed.

PEMBERTON, C. J., and HUNT., J., concur.

STATE OF MONTANA, RESPONDENT, v. BROADBENT,
APPELLANT.

[Submitted April 26, 1897. Decided May 3, 1897.]

Assault and Battery—Evidence—Information—Intent—Instructions.

ASSAULT AND BATTERY—Evidence.—A verdict of guilty of assault and battery in the second degree, is justified where it appears from the record that a witness named Edwards testified that, at the time and place mentioned in the information, he saw defendant, with a whip in his hand, dragging upon the ground in an unconscious condition, one Plum, the person upon whom the assault is alleged to have been committed, —that witness asked the defendant what the trouble was, that defendant answered, "he called me a son of a bitch, and I hit him, I won't take that from anybody," that witness then said "I guess you have fixed him. I guess you won't have to take it off old Dick any more,"—and defendant replied, "I did not hit him very hard. He will be all right in a little while"—although another witness testified that he was with defendant at the time, did not see a whip in his hand, and did not see him drag Plum. Plum testified that he was struck from behind and was rendered unconscious, so he did not know who struck the blow.

INFORMATION—Intent.—It is not necessary to allege, in an information for an assault and battery in the second degree as defined in subdivision 3, section 401 of the Penal Code, that "the assault was committed with the intent to inflict grievous bodily harm;" because the statute does not include the word "intent" in defining the crime.

INSTRUCTIONS.—Where the "intent" is not made a part of the definition of the crime of

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assault and battery in the second degree, it is not error to refuse the request to instruct the jury that the assault must have been made "with the intent to inflict grievous bodily injury."

SAME.—Where the instructions given by the court are correct, the verdict will not be disturbed because the instructions are not full enough, unless the court, upon request, refused to instruct more fully.

ARRAIGNMENT.—A motion in arrest of judgment on the grounds that defendant was not arraigned, and that no copy of the information with indorsement thereon including names of witnesses was ever delivered to him, is properly denied, when the record shows that defendant was personally present in court, and was arraigned and counsel appointed for him, and that he waived time allowed by statute, and thereupon entered his plea of "not guilty."

Appeal from District Court, Gallatin County. F. K. Armstrong, Judge.

JOHN BROADBENT was convicted of assault in the second degree, and he appeals. Affirmed.

Statement of the case by the justice delivering the opinion.

On the 6th day of April, 1896, the defendant in this case, John Broadbent, was convicted of assault in the second degree in the district court of Gallatin county, and on the 18th day of said month judgment was rendered in said court against the defendant, by which he was sentenced to imprisonment in the penitentiary for one year.

The information in the case is as follows :

"W. L. Holloway, county attorney for the county of Gallatin, in the state of Montana, who prosecutes in the name and on behalf and by authority of the state of Montana, comes now here into court, and gives the said district court to understand and be informed by this information that the above-named John Broadbent is guilty of the crime of assault in the second degree, committed as follows; that is to say :

"That the said John Broadbent, late of said county and state, on Thursday the 20th day of February, 1896, at the county of Gallatin and state of Montana, then and there, by some means to this informant unknown, in and upon one Byron Plum, then and there being, unlawfully, feloniously, willfully, and wrongfully did make an assault, and then and there, with some means unknown to this informant, did beat and bruise him, the said Byron Plum, thereby, by means aforesaid, in

and upon the head of him, the said Byron Plum, unlawfully, feloniously, willfully, and wrongfully did inflict grievous bodily harm; against the peace and dignity of the state of Montana, and contrary to the form, force, and effect of the statute of said state in such case made and provided."

At the close of the testimony on the part of the state, counsel for defendant moved the court for a nonsuit, for the following reasons:

(1) "That the information does not state facts sufficient to constitute a public offense."

(2) "There is not sufficient testimony by the plaintiff to warrant a conviction of the defendant at the hands of the jury."

(3) "That the court has no jurisdiction of the defendant in this case, in that he has never been, arraigned in accordance with the laws of the state of Montana."

This motion was overruled by the court. The defendant offered no evidence. The jury returned a verdict of guilty against the defendant of assault in the second degree, in manner and form as charged in the information. After the verdict the defendant filed a motion in arrest of judgment on the grounds:

(1) "That the information in the said cause does not state facts sufficient to constitute a public offense."

(2) "The court has no jurisdiction to try and determine the said matter, for the following reasons:

(a) "The defendant has never been arraigned in accordance with section 1893 of the Penal Code of the State of Montana, and that no copy of the information in said cause, with the endorsements thereon, including the lists of witnesses, was ever delivered to the defendant at any time, nor anything purporting to be a copy.

(b) "That, at the time said cause was tried, the regular panel of jurors for the term of the court at which the defendant was tried, was incomplete in this: that the name of one Elza Cople was called as a juror to sit in the trial of the said cause, and said juror was not in attendance upon the said court.

“And, further, in this: That before the completion of the selection of jurors for the trial of the said cause, the court excused from the regular jury panel for the said term of court, on the ground of his being an incompetent juror, Carl Topel, and also George Gordes, and, by reason of the said persons being so excused, the panel of the said jury consisted of only twenty-one men.”

The court overruled the motion in arrest of judgment. The defendant appeals from an order overruling a motion for a new trial, and from the judgment.

Luce & Luce, for Appellant.

C. B. Nolan, Attorney General, for the State.

PEMBERTON, C. J.—There are several errors assigned in this record. The counsel for the appellant contends that there was no arraignment of the defendant, or plea to the information by him in the court below.

This contention is not supported by the record, for it appears therefrom that the defendant was personally present in court, and was arraigned; that counsel was appointed for him; that he was ordered admitted to bail in the sum of \$500, and, having waived the statutory time to plead, entered his plea of not guilty. In the face of this record we see no support for this assignment of error.

Counsel for appellant contends that the evidence is insufficient to support the verdict.

There is but little real conflict in the evidence. Witness Edwards testifies that he saw from a little distance the defendant, with a good-sized whipstock in his hand, dragging Plum around on the ground. He did not see defendant strike Plum, but when he got to where the parties were he asked what the trouble was. “The defendant said: ‘He called me a son of a bitch, and I hit him. I won’t take that off from anybody.’ I said to defendant: ‘I guess you have fixed him. I guess you won’t have to take it off old Dick any more.’ Defendant said: ‘I did not hit him very hard. He will be

all right in a little while.''' All this time Plum was lying on the ground unconscious. Plum is an old man. The defendant is a young man. Plum says he was walking along a pathway near the house, when he was knocked down by some one that he did not see, and that the blow rendered him unconscious for some time; he did not know how long; that when he came to his senses Edwards was there. Plum had a bruise on his cheek, and a wound on the back of his head about four inches long, from which oozed blood and bloody water. He did not get over the effects of this wound for some weeks. A man named Ritchie, who came with the defendant and went away with him, testifies that he did not see the whip in defendant's hand, and did not see him drag Plum, nor any evidence of the dragging. But this does not really contradict Edwards. He swears that he did not see some things that Edwards swore to. That is all. Both witnesses may be telling the truth. We think the evidence, upon the whole, fully supports the verdict.

Counsel for appellant contends that the information will not support the judgment in the case, and claims that the information only charges an assault in the third degree.

This question was not raised in any manner in the lower court. It seems that the principal ground for this contention is that the information does not charge that the assault was committed by the defendant with the intent to inflict grievous bodily harm upon Plum. Under subdivision 3, § 401, Penal Code, every person is guilty of an assault in the second degree who "willfully or wrongfully wounds, or inflicts grievous bodily harm upon another, either with or without a weapon." The specific intent to wound or inflict grievous bodily harm upon another by the assault is not an ingredient of the offense by the statute. The statutory offense consists in willfully or wrongfully wounding or inflicting grievous bodily harm upon another. It is true that a criminal intent must be alleged in some way. But must it, under this statute, be specifically alleged? It is alleged in the information that the defendant "unlawfully, feloniously, willfully, and wrongfully did inflict grievous bodily harm" upon Plum. In Bishop's New Crim-

inal Procedure (subdivision 3, § 521, vol. 1), we find the rule thus stated:

"The evil intent, being an element in every crime, must always be in some way alleged. Direct words, varying with the case, are required where it is in a form special to the particular offense, or where it is an affirmative item in the charge; but where, in the nature of the individual case, it is a part of the acts alleged, it need not be separately stated. The joint intent and act need simply be so set down as, on the whole, to show a *prima facie* crime."

The same author (in section 523, vol. 1) says: Generally, "the rule is that, if the statute creating an offense is silent concerning the intent, nothing of the intent need appear in averment."

We think, therefore, that the information contains a sufficient allegation of intent in its general terms alleging the offense.

Appellant contends that the instructions of the court were erroneous, because they did not contain a charge to the jury that they must find that the defendant committed the assault with the intent to inflict grievous bodily injury upon Plum. For the same reasons that we hold it unnecessary to allege such specific intent in the information, we think it was not error to refuse to charge the jury that they should find the assault to have been committed with such specific intent. We think it was sufficient to charge the criminal intent generally. This the court did. And, besides, the instruction especially complained of, for the reason that it omits reference to the specific intent to inflict grievous bodily injury, is not one in which the court is attempting to define the offense at all. In this instruction the court, in substance, tells the jury that it is not enough that they find that the defendant assaulted Plum, but they must also find that grievous bodily injury resulted therefrom. This instruction, we think, could not have been prejudicial to the defendant.

Counsel complains that the court did not fully instruct the jury as to the different statutory degrees of assault.

Without determining whether it was necessary for the court to instruct the jury as to the different degrees of assault or not, still we think the court did so sufficiently. The court told the jury, in substance, that they could, if the evidence warranted them in so doing, find the defendant guilty of assault in the second or third degree, after sufficiently defining the two degrees.

If the instructions were correct as far as they went, but, in the opinion of appellant, did not define the different degrees of assault as fully as appellant desired, he should have made requests to the court for fuller declarations of the law. This was not done. The record does not show that appellant asked for any instructions.

We see no error in the action of the court in overruling the appellant's motion for a nonsuit, as it is called. The motion should be called a motion or request to instruct the jury to find a verdict of not guilty. Some of the reasons for this motion are out of place, as they are rather grounds for demurrer.

The grounds for the motion in arrest of judgment are not well taken. The grounds assigned would find a more appropriate place in a demurrer to, or motion to quash, the information. And what has been said above disposes of these motions, if they had any merit.

We think the record, as a whole, discloses the fact and forces the conclusion that defendant had a fair trial on the merits of the case, and we are therefore not inclined to disturb the result.

The judgment and order appealed from are affirmed.

Affirmed.

HUNT and BUCK, JJ., concur.

McELWEE, APPELLANT, v. McNAUGHTON, RESPONDENT.

PER CURIAM.—This was an action instituted by the contestant to determine the right of respondent McNaughton to the office of county clerk and recorder in and for the county of Gallatin. Inasmuch as it involves substantially the same questions decided in the case of *State ex rel Brooks v. Frankham*, 19 Mont. 273, 48 Pac. 1, counsel for both parties agree that this court may make an order reversing the judgment and remanding the cause to the district court of Gallatin county, there to be proceeded with under the law as laid down in the decision just above referred to.

It is, therefore, ordered that the judgment be reversed and that the cause be remanded to the district court with directions to proceed as heretofore indicated.

Remittitur forthwith.

Reversed and Remanded.

IN RE LITER'S ESTATE.

[Submitted April 26, 1897. Decided May 3, 1897.]

Administration—Proof of Death—Affidavit—Presumption of Death.

ADMINISTRATION—Proof of Death.—In application for letters of administration where there is no contest, affidavits of non-resident witnesses, taken before a notary public, may be used to prove death, although no commission was issued and no notice was given that the testimony of such witnesses would be taken.

SAME.—The district judge, if he is not satisfied with the proof thus offered, has the power to order further testimony.

SAME—Presumption of Death.—The law presumes the death of a person who is shown to have departed from her home more than 14 years prior to application for letters of administration, and has never returned, and who has never been heard of by her mother and sisters for more than 14 years, although they made diligent search in the attempt to find her.

Appeal from District Court, Ravalli County. F. H. Woody, Judge.

PETITION by the public administrator of Ravalli county, Mont., for letters of administration on the estate of Eva B. Liter. The petition was denied, and petitioner appeals. Reversed.

Statement of the case by the justice delivering the opinion.

Upon the 23d day of April, 1895, the public administrator of Ravalli county made application in the district court for letters of administration upon the estate of Eva B. Liter. The petition set forth that the said Eva B. Liter, in or about the month of April, 1882, departed from her home in said county and went to Ogden, in Utah territory, at which last-mentioned place she was last heard of in 1883, and that after diligent search and inquiry on the part of her near relatives, no trace of her had ever been discovered; that the said Eva B. Liter left an estate in said county, consisting of real and personal property, not exceeding in value the sum of \$2,000; that the said estate was uncared for and in danger of being lost in consequence of having been sold for taxes in 1894; and that the next of kin of said Eva B. Liter were Martha J. Cash, her mother, and her two sisters, Sallie E. Buchanan and Rebecca R. Brown, all residing in New London, in the state of Missouri. The petition further alleged that said Eva B. Liter had two children, aged 10 and 3 years, respectively, who accompanied their mother and disappeared with her. The petition was filed apparently at the request of the nonresident heirs aforesaid, and notice of the petition was duly given, as required by the statute.

On July 13, 1896, the application for letters, with proofs, was duly submitted to the judge of the district court. Certain witnesses were examined orally, who testified that they knew Eva B. Liter when she resided in their neighborhood; that she had rented her ranch for the period of three years for \$100 per year, and sold off her personal property, and left there, accompanied by her two little daughters and a man by the name of Charles Mercer, in May, 1881; and that she had not

been heard from since that time, so far as the witnesses knew, by any one, except through one letter, said to have been received by one of her neighbors, and postmarked "Ogden, Utah," several months after her departure, which letter related to the collection of the first year's rental of her ranch.

There were also submitted to the court depositions of the mother and two sisters of said Eva B. Liter, taken before a notary public in Missouri. In these depositions the mother, after stating her age and place of residence, testified that she believed her daughter Eva B. Liter to be dead. Her reasons for this belief were as follows: "Because we cannot hear anything from her, or ascertain anything about her. For some time prior to 1881, she and her husband, N. B. Liter, lived at or near the town of Victor, in the state of Montana, and she came to Missouri to visit relatives here. In the month of May, 1881, she started back to Victor, Montana, and was met at the town of Deer Lodge, Montana, by her husband, and they started by overland route to Victor, and her husband died on the way before reaching Victor. My daughter Eva Liter stayed near Victor on her farm for about one year after the death of her husband. In the month of May, 1882, she started for Missouri, intending to come back to her relatives and reside permanently. When she left Victor she had with her her two children, Gertrude and Martha Liter, these being her only children, aged ten and three years, respectively, and an old lady whose name I do not now remember, and a man by the name of Charles Mercer, who was a farm hand who had been working on the farm for her for some time past, and she had gotten him to drive the wagon to Ogden City for her, so that she and the children might take the train there for Missouri. It was a five days' journey, and the old lady stopped at her destination, the place where she was going, one day before the end of the journey; that is, one day before they should have reached Ogden. This old lady is now dead. It is understood and believed, from the best information we can get, that Mrs. Liter had money with her on this trip, and it is believed that she and the children were murdered. At least,

nothing has ever been heard since by any one, although great and diligent search has been made. We have made diligent search and inquiry for her and the children for years, but have heard nothing whatever of or from her since she left Victor for Ogden City."

Then follow the details of the inquiry and search made. The depositions of the sisters corroborated that of the mother. The mother also testified that she believed her daughter Eva B. Liter had died intestate. The commission to take the depositions was issued by the clerk of the district court on September 30, 1895.

The court took the matter under advisement, and on December 15, 1896, denied the application for letters of administration. The court certifies that the depositions referred to were not considered, for the reason that they did not comply with the requirements of section 3350, Code of Civil Procedure of Montana, in that no notice was ever served or filed with the clerk of the court, signed by said petitioner, or by any one in his behalf; that no list of interrogatories was ever filed with said clerk, and no order was ever made or signed by the court, or judge thereof, directing the issuing of the commission under which said depositions were claimed to have been taken.

This appeal is from the order denying the application for letters of administration.

H. D. Moore, for Appellant.

BUCK, J.—Under the probate statutes of the Montana Code of Civil Procedure of 1895, an application for letters of administration may assume the form of an action, to which there are parties plaintiff and defendant. This would probably be the case when two applications for letters on the same estate, adverse to each other, are heard together. (See sections 2443, 2444, 2923, Code Civ. Proc.) Under the statutes in force prior to July 1, 1895, where an application for letters of administration was contested and issues of fact arose, the proceeding might also have been regarded as one in the form of

an action, to which there were opposing parties. Under the Code of Civil Procedure (Comp. St. 1887), however, as well as under the present Code of 1895, when, after due notice given as required by statute, no one contests an application for letters of administration, the proceeding cannot be regarded as an action, with parties opposed to each other in interest. It is true, under section 2447, Code of 1895, proof must be made of intestacy and death in the same manner as the statute prior to the time it took effect required. The object of such an inquiry, however, was and is only to ascertain what condition of facts exists. Questions must be answered, but no actual issues of fact are involved in the hearing of proof in respect to the questions. The district court or judge acts simply in behalf of all persons interested in the administration of the estate, and does so both in a somewhat ministerial as well as judicial capacity. Under section 2446, New Code (section 67, div. 2, Comp. St. 1887), the judge or court must grant letters to any qualified applicant in the absence of a contest, even if there are persons possessing better rights to the letters.

The main proof submitted to the district judge in this case was contained in the rejected depositions. We must concede that these depositions were defective under the requirements of sections 3350, 3351, Code of Civil Procedure of 1895, if they apply. These sections are as follows:

Section 3350: "The deposition of a witness out of this state may be taken upon the commission issued from the court, under the seal of the court, upon an order of the court, or a judge thereof, on the application of either party, upon five days' previous notice to the other. If issued to any place within the United States, it may be directed to any person agreed upon by the parties, or if they do not agree, to any judge or justice of the peace, or commissioner, selected by the court or judge issuing it. If issued to any country out of the United States, it may be directed to a minister, ambassador, consul, vice consul, or consular agent of the United States in such country, or to any person agreed upon by the parties."

Section 3351: "Such proper interrogatories, direct and

cross, as the respective parties may prepare to be settled, if the parties disagree as to their form, by the judge or officer granting the order for the commission, at a day fixed in the order, may be annexed to the commission; or, when the parties agree to that mode, the examination may be without written interrogatories."

Section 3320, Code of Civil Procedure of 1895, says: "The testimony of a witness is taken in three ways: (1) By affidavit; (2) by deposition; (3) by oral examination."

Section 3321 defines an affidavit as follows: "An affidavit is a written declaration under oath, made without notice to the adverse party."

Section 3322 defines a deposition thus: "A deposition is a written declaration under oath, made upon notice to the adverse party for the purpose of enabling him to attend and cross-examine."

Section 3330 is as follows: "An affidavit may be used to verify a pleading or a paper in a special proceeding, to prove the service of a summons, notice or other paper in an action or special proceeding, to obtain a provisional remedy, the examination of a witness, or a stay of proceedings, or upon a motion, and in any other cases expressly permitted by some other provision of this Code."

Section 3334 reads thus: "An affidavit taken in another state of the United States, to be used in this state, may be taken before a commissioner appointed by the governor of this state to take affidavits and depositions in such other state, or before any notary public in another state, or before any judge or clerk of a court of record having a seal."

Section 3340 is as follows: "In all cases other than those mentioned in section 3330, where a written declaration under oath is used, it must be a deposition as prescribed by this Code."

Section 3341 is as follows: "The testimony of a witness out of the state may be taken by deposition in an action at any time after the service of the summons or the appearance of the defendant, and in a special proceeding at any time after a question of fact has arisen therein."

In a proceeding where there are no parties, in the sense of adverse parties plaintiff and defendant, what object would be subserved by giving the notice required by section 3350, *supra*? Clearly, none. The distinction between an affidavit and a deposition is defined in section 3322, *supra*. Each is a declaration under oath, and the distinction recognized by the court between the two is simply for the purpose of preserving the right of cross-examination. Nor, from an abstract standpoint, would there be any necessity for attaching formal interrogatories to the commission to take the deposition as required by section 3351, *supra*. Whether these sections 3350 and 3351 were intended to prescribe a method of obtaining testimony to be used in a probate proceeding of the character of this one we have under consideration, we rather doubt. If they do not, however, section 3341, *supra*, is broad enough in scope to cover the taking of testimony to be used in probate matters to which there are no adverse parties. Even if no specific mode has been prescribed by law for taking a deposition in such cases, section 205, Code of Civil Procedure, supplies the omission. It is as follows:

"When jurisdiction is, by the constitution or this Code, or any other statute, conferred on a court or judicial officer, all the means necessary to carry into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code."

It is true that as a general rule of law upon the trial of an issue of fact, an *ex parte* affidavit cannot be admitted in evidence for any other purpose than the contradiction of the affiant. (See 1 Enc. Pl. & Prac., p. 338). But in this proceeding, as has been stated, there was no actual issue of fact, and under sections 205, 3340, and 3341, despite any literal interpretation of sections 3330 and 3340 which might seem to forbid it, we think it would have been proper for the lower court to have considered these sworn declarations of the relatives of Eva B. Liter, whether designated as "affidavits" or

"depositions," in the absence of anything impugning them, for the purpose of determining whether letters of administration should have been issued to the public administrator. We think this is in accordance with the spirit of the Code.

As to the objection that the judge had not authorized the issuance of the commission for the taking of these depositions, we think that also amounts to little. It is true, under circumstances which might arise, the judge might desire to have special questions put to a nonresident witness whose affidavit or deposition was to be used before him; but, in such a case, if upon the examination of the affidavit or deposition presented to him he is still in doubt, he would have full power to order and have prepared more complete affidavits or depositions.

In this appeal the judge himself states the reasons in full why he did not consider these sworn declarations of the mother and sister of Eva B. Liter, and hence we deem it unnecessary to go more fully into the matter as to any other objections which might be made.

Was the evidence before the trial judge sufficient, then, to justify the granting of the letters of administration upon the estate of Eva B. Liter to the public administrator?

Code of Civil Procedure, § 3266, subdivision 26, is as follows:

"All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind: * * * (26) That a person not heard from in seven years is dead."

The petition of the public administrator was filed on the 23d day of April, 1895, before the Code of 1895 took effect; but the rule embodied in section 3266, subdivision 26, *supra*, simply embodies what was the law of the state in relation to a presumption of death from absence prior to July 1, 1895, when the Code of 1895 went into effect. The law is well stated in 1 Am. & Eng. Enc. Law, p. 37, as follows:

"The rule of law is that, upon a person leaving his usual home and place of residence for temporary purposes, and not

being heard of or known to be living for the term of seven years, the presumption is that he is not alive. It must appear that he has not been heard of by those persons who would naturally have heard from him during the time had he been alive. The rule, however, does not confine the intelligence to any particular class of persons. It may be to persons in or out of the family. The mere failure to hear from an absent person for seven years who was known to have had a fixed place of residence abroad would not be sufficient to raise the presumption of his death, unless due inquiry had been made at such place without getting tidings of him."

The evidence before the trial court showed that Eva B. Liter, with her two children, departed from her home in Ravalli county a long time ago; that she never returned; and that neither she nor her children had been heard of for a period of some 14 years by her near relatives,—her mother and two sisters,—who had made inquiries about her, and had sought a long time to obtain intelligence of her whereabouts. From the evidence it does not appear that she had ever taken up her residence in another place. Her mother and sisters testified that she started for Missouri to reside there permanently. Her neighbors testified that she had rented, not that she had sold, her ranch. On this statement of facts, unless the court had reason to believe that the statement before it were untrue, a clear presumption of death was raised by the evidence, and, in the absence of anything showing the contrary, letters of administration should have been granted to the public administrator.

It is true the proof is very slight as to the intestacy of Eva B. Liter, but if the court is in doubt about that, it can hear further evidence on the subject. If it is in doubt, for any valid reason, of the death of Eva B. Liter, it can also hear further proof. But if there is no reason to doubt the truth of the evidence already before it, it is the duty of the lower court to grant the letters of administration applied for.

Under section 3366, *supra*, the presumption of death is a disputable one, and may be controverted by other evidence;

but section 3264, Code of Civil Procedure of 1895, is as follows:

“A presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect; but unless so controverted, the jury are bound to find according to the presumption.”

If, under said section 3264, a jury would be bound to find death, why should not a district judge, inquiring into a condition of facts, be also governed as a jury would have been if there had been an actual contest?

The judgment or order denying the application for letters of administration is reversed, and the cause is remanded, with directions to the lower court to act in accordance with the views herein expressed.

Reversed and Remanded.

PEMBERTON, C. J., and HUNT, J., concur.

STATE OF MONTANA, RESPONDENT, v. MANSFIELD.
APPELLANT.

19	483
31	133
19	483
29	276

[Submitted April 30, 1897. Decided May 10, 1897.]

CRIMINAL PRACTICE—Information—Demurrer.—It is not necessary to plead, in an information charging a public offense, that leave of court was had to file the same,—and it is not necessary to verify the information,—if an examination was had before a magistrate. A demurrer to an information on the grounds above stated is properly overruled.

SAME—Practice—Presumption.—When the defendant in a criminal case objects to the information because leave of court was not had to file the same, or because an examination was not had before the same was filed on a complaint under oath, a motion to quash supported by affidavits, and not a demurrer, is the proper practice,—the presumption being that these preliminary steps were properly taken, if nothing to the contrary affirmatively appears.

Appeal from District Court, Silver Bow County. William O. Speer, Judge.

DAVID MANSFIELD was convicted of murder in the second degree, and appeals. Affirmed.

Statement of the case by the justice delivering the opinion.

On the 6th day of February, 1896, the defendant was found guilty of murder in the second degree by a jury in the district court of Silver Bow county, and on the 8th day of said month was by the court sentenced to imprisonment for the term of 25 years in the penitentiary. On the arraignment of the defendant under the information in this case he filed his motion to quash the information for the reason, among other grounds, that it does not appear from the said information that leave of the court was had to file the same, or that an examination was had before filing the same, and for the further reason that said information was not verified as required by law. The defendant also demurred to the information for the following, among other reasons: "That it does not appear from said information that leave of court was had to file the same, or that an examination was had before a committing magistrate before said information was filed, and also that the information is not verified as required by law." Both the motion to quash and the demurrer were overruled by the court. The defendant appeals from the judgment.

Miles Cavanaugh, for Appellant.

C. B. Nolan, Attorney General, for the State.

PEMBERTON, C. J.—The appellant contends that the information is bad, and insufficient to support the judgment, because it does not appear affirmatively on the face thereof that an examination of the defendant had been had before the filing thereof, or that leave of the court had been had to file the same, and for the further reason that the information is not verified by the oath of any one.

It will be observed that the motion to quash and the demurrer to the information are based substantially on the same grounds, and it will be further observed that the contention is not that there was not in fact such examination or leave of court before the filing of the information, but that it does not

affirmatively appear by the information that these things were had and done before the filing thereof. These are questions of pleading. Both the motion to quash and the demurrer go to the same questions. The motion is, in effect, a demurrer, because it, like the demurrer, attacks the information for defects which it avers appear on the face thereof. So that the only question raised in the court below by this motion and demurrer was as to the sufficiency of the information, without it being shown on the face thereof that there had been an examination of the defendant before a committing magistrate, or leave of court to file the information before the same was filed. This is the only question we are called upon to consider.

In *Washburn v. People*, 10 Mich. 372,—a case involving almost the identical questions raised here,—and under a statute which required an examination before a justice of the peace or a waiver thereof by the defendant before the filing of an information, there is an elaborate discussion of the law of the case, and an extensive collation of the authorities. In this case the court said :

“The two grounds urged in support of this assignment are: First, that it does not appear upon the face of the information that the prisoner had had a preliminary examination for the offense, nor that he had waived it, nor that he was a fugitive from justice; and, second, that the information is not verified, as required by the statute.

As to the first point, the plea does not deny the fact of a previous examination, or assert that none had been had, or that it had not been waived. The question, therefore, depending upon matter apparent on the face of the information, rests upon the same grounds, and is to be decided in the same way, as if raised by demurrer. * * * If he intends to insist upon the want of the examination, we think he should, by plea in abatement, set up the fact that it has not been had, upon which the prosecuting attorney might take issue, or reply a waiver; or he must, upon a proper showing by affidavit, move to quash the information. The latter is the simpler

course. The circuit court is a court of general criminal jurisdiction, and the proceeding by information instead of indictment is not, under this statute, an exceptional or special one, but the general mode provided for the prosecution of offenses. We can, therefore, see no more satisfactory reason for requiring this preliminary examination or its waiver to be set out in the information than for averring in an indictment that the grand jury was composed of at least 16 competent grand jurors, or that the indictment was found by at least 12, or any other fact essential to the constitution of a legal grand jury. We cannot think it necessary, on the trial for an offense, to prove the fact of such examination or waiver, more than on the trial under indictment to prove the preliminary matters referred to. The same rule should apply to both, and we think such is the effect of the language of the fourth section of the act of 1859. If not necessary to be proved, it need not be alleged." (*Hamilton v. People*, 29 Mich. 177.)

As we have said above, the point is not made in this case that there was no examination or leave to file before filing the information. It is only that the information, on its face, does not show these things. The motion to quash was not supported by affidavit, or any kind of evidence showing that there had been no preliminary examination or leave of court to file the information. It tendered no issue of fact as to whether there had been a preliminary examination of the defendant or leave of court to file the information before the filing thereof. Whether in fact these preliminary proceedings had been taken was not presented to the court either by the motion or demurrer. There is nothing in the record to show that the defendant did not have an examination before a committing magistrate, or that leave of court to file was not had before filing the information.

Counsel for the appellant concedes that it is immaterial whether the information is verified or not, if there was an examination of defendant by a committing magistrate before the filing of the information. Having held that it was not essential that the information should show such examination on its

face, we must presume, in the absence of any showing to the contrary, that such examination had been had before the information was filed.

The above concession of counsel for appellant, and the presumption that there was an examination of the defendant by a magistrate before the filing of the information, raise the further legal presumption that the examination was had upon a complaint supported by the oath or affirmation of some one, and that the warrant for defendant's arrest was issued upon such complaint thus saving to the defendant the right guaranteed to persons by section 7, article 3 of the constitution of the state, that no warrant to seize any person shall issue without probable cause, etc., shown and supported by oath or affirmation reduced to writing.

We think the information sufficient to support the judgment. The record does not show that the defendant had no examination by a committing magistrate before the filing of the information, and was arrested on a complaint not supported by oath or affirmation, or that no leave of court was had to file the information, if such contentions, or any of them, be true.

We are, therefore, of the opinion that the judgment should be affirmed, and it is so ordered.

Affirmed.

HUNT and BUCK, JJ., concur.

McKAY, APPELLANT, v. McDOUGAL, RESPONDENT.

[Submitted April 2, 1897. Decided April 26, 1897.]

*Action in Trespass—Mining Claim—Complaint—Pleading
Separate Causes of Action.*

In an action in the nature of trespass to try title to a mining claim, it is not necessary for plaintiff to deraign title; a cause of action is stated when the complaint alleges ownership of the plaintiff and ouster.

SAME—A different rule prevails in action brought, after filing of an adverse claim, to determine the right of the litigants to a United States patent to the mining claim in dispute.

PLEADING—*Separate Causes of Action*.—The court suggests the proper practice for pleading separate causes of action in the same complaint.

Appeal from District Court, Madison County. Frank Showers, Judge.

ACTION by Alexander McKay against William J. McDougal. From a judgment for defendant, plaintiff appeals. **Reversed.**

Statement of the case by the justice delivering the opinion.

Plaintiff alleges that he is a citizen of the United States, and the owner of, and entitled to the possession of, and was in the possession of, a certain placer claim, until his possession was interfered with by the defendant, as hereinafter stated. Then follows a description of the placer claim situated in the Union mining district, Madison county, Montana. He alleges that while he was the owner and in the possession of the aforesaid placer mining claim, in June, 1893, and without his knowledge or consent, the defendant wrongfully and without right entered upon the premises, and extracted gold therefrom, to plaintiff's damage; that thereafter again defendant entered upon the property, and took gold therefrom, and threatens to continue said trespasses; and that, if they are continued, great damage will result to the property, and that actions at law will not protect the plaintiff's rights without a multiplicity of suits, and that defendant is wholly insolvent, and unable to respond in damages.

For a further cause of action plaintiff averred that about the year 1893 the defendant claims to have located as a placer claim a portion of the premises described in the complaint, and has filed a pretended notice of location thereof with the county clerk of Madison county, and is asserting title and right of possession to a portion of the ground involved by virtue of said pretended location and notice of location hereinbefore mentioned; but that defendant's said claim is without right, but that the same, while upon the records of Madison county, casts a cloud upon plaintiff's title and right of possession.

The prayer is for damages sustained, and a perpetual injunction enjoining defendant from working, or otherwise trespassing upon the said mining claim, or asserting any right or title thereto, and for a decree adjudging defendant's pretended claim void, and for further relief.

The defendant denied the ownership and right of possession of the premises described in the plaintiff's complaint, denied his entry upon the premises as alleged, and denied all damage. In answer to the second cause of action the defendant admitted that in 1893 he located a placer claim, and a portion of the premises in controversy, and filed his declaratory statement and notice with the county clerk of Madison county, but denied that such action was without right, or that it cast a cloud upon plaintiff's title. For further defense defendant averred that the plaintiff, McKay, and his predecessors in interest, have no right, title or interest in the placer mining claim attempted to be described in the complaint, because at the time of their attempted location thereof the same was not public domain of the United States, and had been already appropriated; that about June, 1876, one Sholes discovered placer within the limits of the ground, and proceeded to locate a placer claim, and did locate one, and marked the boundaries thereof by posting monuments set at the different corners of the claim, so that the same could be readily traced, and posted the notice containing the date of location, name of the locators, name of the claim, and such a description thereof with reference to

natural objects as that its boundaries could be readily ascertained; and that in June, 1876, said Sholes and his associates entered into possession of said placer mining claim, and proceeded to mine the same, and were the owners and in possession thereof at the time of the pretended location by said plaintiff and his predecessor in interest, Abe ——. Defendant then averred that plaintiff had abandoned the claim a long time prior to the commencement of this suit, and had failed to perform the annual work necessary to be performed from the year 1877 up to and including the year 1894. For further defense defendant set up a location by himself made July 22, 1893, of a placer claim known as the "Humbug Claim," pleading a specific description of said Humbug placer claim, and averring that he filed an amended notice thereof for the purpose of correcting errors in the original notice, and that ever since July 22, 1893, except when interfered with by the injunction of the district court, he was the owner of, in the possession of, and entitled to the possession of, said placer mining claim, and was in the actual possession thereof, and mining the same, when the injunction in this suit was served upon him. Defendant then averred that the plaintiff in May, 1894, and at other times, wrongfully entered upon said placer location of defendant, and extracted placer gold therefrom, and that he has been damaged by the trespasses of the plaintiff in the sum of \$2,000. He prayed for damages, and a decree that he be declared the owner and entitled to the possession of said ground and for an injunction.

The plaintiff, by replication, denied the allegations of the defendant in relation to the location or appropriation of the property by defendant or his predecessors, and averred that, if there was any such location, there was an abandonment of the same immediately thereafter, and that in 1877, the land was public domain when appropriated by plaintiff and his predecessors. Plaintiff denied all averments of abandonment and any entry without authority.

The cause came on for trial. When the plaintiff offered evidence under the causes of action set forth in his complaint,

the defendant objected, and the objection was sustained, whereupon the plaintiff's complaint was dismissed, and judgment entered in favor of defendant for costs. The plaintiff having elected to stand upon his complaint, he appeals from the judgment entered against him.

Smith & Word and J. E. Calloway, for Appellant.

W. A. Clark, for Respondent.

HUNT, J.—The plaintiff has set forth in his complaint that he is now, and has been for some time, the owner of, and entitled to the possession of, and in the possession of, until interfered with by the defendant, a certain piece of placer mining ground, more fully described in the complaint. He then sets forth that the defendant claims the property by virtue of a pretended placer location, but that such location is without right, and casts a cloud upon plaintiff's title. The suit is brought for damages for trespass, and by separate statement to quiet plaintiff's title, and for further relief. The defendant denied the ownership and possession and right of possession of plaintiff, and pleaded a title to the premises under the location of the same as the Humbug claim, and possession for a long time back.

The replication denied the new matter in the answer. The district court held that the plaintiff's complaint was fatally defective. The only question before us now, therefore, is that of the sufficiency of plaintiff's pleading. Does it state a cause of action? We think it does.

The allegations of the first part of the complaint state a cause of action in the nature of trespass to try title. The essential principles of pleading and forms of procedure governing this action are like those in actions in ejectment. (Sedg. & W. Tr. Title Land, § 92; Greenleaf on Evidence, § 303.)

If, therefore, the complaint under investigation was in its essential averments good in ejectment, it should be held sufficient in this action, unless in suits involving title to placer mining premises different rules of pleading control.

The respondent cannot seriously controvert the sufficiency of the complaint herein under ordinary rules applicable to ejectment suits. It avers ownership, right of possession, and the fact of possession of the placer ground, an entry by defendant without consent of plaintiff, his mining thereon, and threat to continue to mine, and damages done by reason of the defendant's acts. This was more than enough, under the decision in *Payne v. Treadwell*, 16 Cal. 221, where Judge Field reviewed the earlier decisions of that state, and distinctly overruled those cases which recognized that some of the technical averments peculiar to the old form of ejectment were still necessary under the codes. It was said in that case as follows :

“Now, what facts must be proved to recover in ejectment? These only : That the plaintiff is seised of the premises or some estate therein in fee, or for life, or for years, and that defendant was in their possession at the commencement of the action. The seisin is the fact to be alleged. It is a pleadable and issuable fact, to be established by conveyances from a paramount source of title, or by evidence of prior possession. It is the ultimate fact upon which the claim to recover depends, and it is facts of this character which must be alleged, and not the prior or probative facts which go to establish them. It is the ultimate facts,—which could not be struck out of a pleading without leaving it insufficient,—and not the evidence of those facts, which must be stated. It is sufficient, therefore, in a complaint in ejectment, for the plaintiff to aver, in respect to his title, that he is seised of the premises, or of some estate therein in fee or for life, or for years, according to the fact. The right to the possession follows as a conclusion of law from the seisin, and need not be alleged.”

This form of pleading has been expressly approved by this court in *McCauley v. Gilmer*, 2 Mont. 202, and in the opinion on a rehearing in *Davis v. Clark*, Id. 394, which was an action to try title and recover possession of a quartz lode claim, wherein it was held that in actions of ejectment it is sufficient for the plaintiff to aver that he is seised of the premises, or

some estate therein; and the right of possession follows as a legal conclusion from the seisin. See, also, *Mauldin v. Ball*, 5 Mont. 96, 1 Pac. 409; *Billings v. Sanderson*, 8 Mont. 201, 19 Pac. 307; *Bank v. Roberts*, 9 Mont. 328, 23 Pac. 718; where *Payne v. Treadwell*, *supra*, is cited with approval.

But it has been thought by many members of the profession that in suits to try the title to mining property, as well as in those to determine the right of possession of such property by adverse claim, to state a cause of action it is necessary for the plaintiff to do much more than in ordinary suits to try title, and to allege that he had located the claim according to law, marked the boundaries, made discovery, made notice of location under oath, and recorded the same. Relying on the accuracy of this proposition, the respondent's counsel herein bases his argument; and we presume it was upon a like view that the district court founded its order dismissing the plaintiff's complaint.

Doubtless this embarrassment as to forms of pleading has arisen largely because of the opinion of the court by Judge Liddell in the case of *Ducie v. Ford*, 8 Mont. 233, 19 Pac. 414. That was a suit to enforce specific performance of a verbal agreement, under which plaintiffs contended that defendant had agreed to deed to plaintiffs a certain interest in a mining claim, upon defendant's obtaining patent therefor from the United States, in consideration of plaintiffs abstaining from filing an adverse claim to defendant's application for patent. Part performance was alleged. A demurrer to the complaint was sustained upon two grounds; that the contract was void under the statute of frauds, and that the plaintiffs had not alleged "every fact which it was necessary for them to prove in order to have succeeded in their adverse claim had they filed one." In discussing the latter ground of demurrer, Judge Liddell said :

"It is not enough for the complaint to allege that the mining laws had been complied with, for such an averment is merely a legal conclusion; and so, also; is the allegation of the right of possession and ownership of the claim in dispute.

(*Meyendorf v. Frohner*, 3 Mont. 323; *Payne v. Treadwell*, 16 Cal. 221.) It is for the court to say, from the facts stated and proven, whether or not the law has been complied with to that extent which would have entitled the complainants to the patent. In other words, it was not only necessary for the complaint to show that the plaintiffs made the discovery and location, marked the boundaries of the mine, filed their notice and declaratory statement, with proper description with reference to some natural object or permanent monument, and that they were in possession as owners from the time of discovery; but it was indispensable and material for them also to set forth in their complaint that they were either citizens of the United States, or had filed their intention or declaration of becoming so; and that up to the time of the application of the defendant for a patent for the Olin claim they had complied with the law, which required them to expend a hundred dollars a year in improving the mine. * * * When, therefore, the complainants failed to make the allegations of their capacity to take title, and of having done the necessary amount of work each year to represent the mine, along with the other facts stated in the complaint, they failed to set forth a cause of action. The omissions were fatal to their suit. Indeed, it is impossible to tell from the complaint whether the plaintiffs have the requisite capacity to accept a title to the mine, even if decreed them by the court. To decide the case without this allegation, which we cannot supply, would be doing a vain and useless thing."

To a great extent, since that decision, pleadings in actions in the nature of ejectment to try title to mining claims have been incumbered with allegations conforming to the several matters held essential to be pleaded in that opinion. Yet, if the principle is correct that seisin and possession are the ultimate facts to be alleged, and it is not necessary to aver the prior or probative facts which go to establish them in order to state the facts which constitute the cause of action "in ordinary and concise language" as pertaining to real property generally, why should a different rule govern in actions to try the title to mining property?

We are not dealing with questions of proof on the trial, but are confining ourselves solely to those of pleading. When it comes to establishing the fact of ownership, if at issue, then plaintiff must support his pleading by claim from a paramount source of title, or by evidence of compliance with the mining laws of the United States and of the state. But in *Ducie v. Ford*, *supra*, the court evidently overlooked the distinction between issuable facts necessary to be alleged and those that are probative, but which need not be alleged. This is also made apparent by the particular language of the sentence supported by reference to *Payne v. Treadwell*, *supra*. It was said, for instance, upon the authority of *Payne v. Treadwell*, that the allegation of the right of possession and ownership of the claim in dispute is merely a legal conclusion, whereas Judge Field's exact language is as follows :

“It seems to us that the substance of a complaint in ejectment under our practice is this : ‘A. owns certain real property, or some interest in it. The defendant has obtained possession of it, and withholds the possession from him.’ If the defendant's holding rests upon any existing right, he should be compelled to show it affirmatively, in defense. The right of possession accompanies the ownership, and from the allegation of the fact of ownership, which is the allegation of seisin in ‘ordinary language’—the right of present possession is presumed as a matter of law.”

The allegation of ownership of a claim in dispute is, therefore, not a mere conclusion of law, and the language of the opinion in *Ducie v. Ford* must be modified to harmonize with its misapplied authority,—*Payne v. Treadwell*, *supra*,—and to our views herein. We observe, also, that while Chief Justice McConnell concurred in the decision of *Ducie v. Ford*, he limited his agreement to the single ground of the statute of frauds, thus expressing no opinion upon the question of pleading.

The error into which the court fell in extending the rule of pleading in *Ducie v. Ford* arose, evidently, from the earlier discussions of this court, of what constitutes the right of pos-

session of a mining claim. We recognize that such right of possession comes only from a valid location, and that, if there is no location, there can be no possession under it. Nor do we lose sight of the rule laid down in *Belk v. Meagher*, 104 U. S. 284, that location does not necessarily follow from possession, but possession from location, and that a location is not made by taking possession alone, but "by working on the ground, recording, and doing whatever else is required for that purpose by the acts of congress and the local rules and regulations." But in pleading in actions of the nature of this it is not necessary to allege all those matters which are evidentiary, and go to sustain the possessory title or ownership. It may be that the reasoning of Judge Liddell's opinion was based upon the attempt to deraign title, and upon a failure to do so in a sufficient manner; but, whether or not the discussion proceeded on that theory, the case has been generally applied in all suits to try the title to mining property.

The later decisions of California have followed *Payne v. Treadwell*, *supra*, and it has been consistently held for many years that in actions to quiet title to mining claims and for injunctions, ownership is the ultimate fact, and, as a general rule, it is sufficient to allege that in terms. See *Souter v. Maguire*, 78 Cal. 543, 21 Pac. 183, and cases cited; *Johnson v. Vance*, 86 Cal. 128, 24 Pac. 868.

It was also decided in *Campbell v. Rankin*, 99 U. S. 261, that in an action of trespass *quare clausum fregit* actual possession of the land by the plaintiff is sufficient evidence of the title to authorize a recovery against a mere trespasser. It is well now to notice our own decisions cited by respondent as bearing upon the question.

In *McKinstry v. Clark*, 4 Mont. 390, 1 Pac. 759, plaintiff brought ejectment to recover possession of a mining claim. We have examined the original transcript, and find that the complaint simply averred that plaintiff "was the owner of and seised of an estate in fee as against all persons but the government of the United States, and possessed and entitled to the possession of the real property hereinafter set forth, and that,

while plaintiff was so the owner, and so seised, defendants entered," etc.

Noyes v. Black, 4 Mont. 527, 2 Pac. 769, was an action to quiet title to the premises described in the plaintiffs' complaint. The court considered the attitude of one claiming by actual possession against a valid location. It was decided that the plaintiffs by virtue of possession alone could not hold mining ground as against a valid location of the same ground, and, after laying this rule down, the court proceeded to sustain the doctrine of *Belk v. Meagher*, heretofore cited. But, although the court in *Noyes v. Black* said the plaintiffs must prove they made a valid location by taking possession and by working on the ground, recording, and doing whatever else was required for that purpose by the acts of congress and local rules and regulations, it did not say that such matters of proof, or any of them, must be specifically alleged in the plaintiffs' complaint.

We have taken the pains to examine the original transcript in the case of *Noyes v. Black*, and find that that complaint likewise simply alleged that the plaintiffs, as tenants in common, were the owners of, in actual possession of, and entitled to the possession of, a piece of placer ground described in the complaint, and that the defendants claimed an estate in the said ground adverse to the plaintiffs', but that said adverse claim of the defendants was based upon a pretended location of a lode claim called the "Welcome Stranger Lode." Then followed averments to the effect that the adverse claim of defendants was without right, and fraudulent, and that in consequence of said claim plaintiffs' placer ground was much depreciated in value. It will be seen at once that there is great similarity between the pleading in that case and the one in the case at bar. But the court there seemed to consider the location of defendants as a valid one, although the complaint averred that it was pretended. This assumption by the court must have been warranted by the developments on the trial of that case, for, where the plaintiff alleges ownership and possession until ousted by the defendant, and alleges that the

defendant claims by virtue of a pretended location of the property, it cannot be assumed on the pleadings that the case is one of actual possession against a valid location.

Tibbits v. Ah Tong, 4 Mont. 536, 2 Pac. 759, also discussed the right to occupy the mineral lands of the United States, but did not say to what extent the allegations of a pleading to try the title must go.

In *Hopkins v. Noyes*, 4 Mont. 550, 2 Pac. 280, which was a suit growing out of a conflict between a placer and quartz location, where plaintiff sued to have determined the right of possession of ground in dispute, the court merely reiterated its previously expressed views upon what possession is necessary to give vitality to a title within a mining district, and said that such title must be in pursuance of the law and local rules and regulations, and must be properly supported. "Possessory titles," said Wade, C. J., "do not live upon possession alone. They must be supported by proof of a compliance with the law that gives the right to and sustains the possessions." But it was not decided that, in order to permit such proof of a compliance with the law, the complaint must contain allegations of the facts upon which such possessory title is based.

In *Garfield M. & M. Co. v. Hammer*, 6 Mont. 54, 8 Pac. 153, which was an action to quiet title, the court said that, where respondent's claim of ownership and right of possession were put in issue by answer, it devolved upon the respondent plaintiff to show affirmatively on the trial that it had a valid location of a mining claim by complying with all the requirements of the acts of congress and the local rules and regulations relative to mining claims. The sufficiency of the pleading was not discussed.

Renshaw v. Switzer, 6 Mont. 464, 13 Pac. 127, was an action in the nature of ejectment to recover possession of a lode mining claim. The court decided that it was enough for the claimant to show a valid location and that the plaintiff need not show that his claim had been represented, but that his title was good after showing a valid location, and he was entitled to the possession of the claim unless the appellant defeated such

title, which he might have done if he had alleged and could have proved a forfeiture by showing that the necessary work to represent the claim had not been done. We have examined the original complaint in this case also, and it does not sustain the contention of respondent's counsel herein to the effect that, if it is necessary to show a valid location in order to show a possessory title and ownership, it is necessary to allege the prior facts upon which such valid location may be predicated. The complaint in *Renshaw v. Switzer* simply alleged that plaintiffs were, and for a long time prior to the commencement of the suit had been, the owners and entitled to the possession of the mining claim described in the complaint; that while they were the owners defendants took possession, and ousted them, and still held possession, to the plaintiff's damage, etc.

Mattingly v. Lewisohn, 8 Mont. 259, 19 Pac. 310, was a statutory action brought under section 2326 of the Revised Statutes of the United States. It was decided that in an action brought under the Revised Statutes authorizing steps to be taken by an applicant for a patent for mineral lands, and by an adverse claimant who resists such application, it was indispensable for the plaintiff to file his claim within the 60 days allowed by law, or he would have no standing as an adverse claimant in the land office; and that, if he failed to institute suit within 30 days allowed by law, he had no standing in court to contest the claim of another to a patent for mineral land; and that, inasmuch as the fact of the filing of the adverse claim and the institution of the suit within the time limited by law must be conclusively established by proof to enable the adverse claimant to recover, it was necessary to allege these facts, and that a complaint without such allegations was insufficient. As applied to actions of the class to which *Mattingly v. Lewisohn* belongs, we believe that to be correct in order that it may appear that the court had jurisdiction to proceed with the case; but such averments of fact have nothing directly to do with the title or right of possession to the property involved, and are not probative facts of the ownership of the plaintiff. Therefore, whatever was said in that opinion by Judge De

Wolfe for the court has no bearing upon the question immediately in hand.

Milligan v. Savery, 6 Mont. 129, 9 Pac. 894, simply decided that in an action brought under section 2326 of the Revised Statutes of the United States, to determine the right of possession of a mining claim, plaintiff must allege possession in himself, or a valid representation, which is possession; and an ouster by the defendant, if plaintiff is not in possession, must always be shown, and to that end must be averred.

We find, therefore, that in so far as any of the foregoing cases do bear upon the case at bar, with the exception of *Ducie v. Ford*, they not only do not conflict with *Payne v. Treadwell*, and the other California decisions since *Payne v. Treadwell*, in respect to pleading, but that the original complaints therein substantially followed that case, and that the prolix rule laid down in *Ducie v. Ford* was never before actually observed by the profession in the cases brought before this court. We conclude this discussion by affirming the California doctrine, believing it to be in accord with the principle which should control the form of pleadings under the Codes, and hold that the ultimate facts alone need be pleaded. (Pom. Code Rem. § 107).

The defendant makes a point on the alleged insufficiency of the description of the placer claim involved. But, without setting forth in full the description given, we do not think it was so indefinite as to render the complaint fatally bad, or void for uncertainty, upon a motion of the character interposed by defendant.

In the second cause of action set up by the plaintiff,—which was for the purpose of quieting title and for an injunction,—the plaintiff, by reference merely, made the averments of ownership pleaded in the first cause of action and the description of the premises part of the second cause of action. Inasmuch as the cause must be remanded to the district court, we advise the plaintiff to follow the general rule that each separate division or count of the complaint must be complete in itself, and that the pleader, by merely referring to material facts

properly set forth in a former count, cannot incorporate them into and make them part of a subsequent one. (Pom. Code Rem. § 575). This rule should not be extended to the inclusion of a description of the property itself, nor to a point requiring exhibits to be repeated, but it should be held to embrace those material and issuable facts of ownership which constitute the plaintiff's action.

The judgment of the district court is therefore reversed, and the cause is remanded, with directions to overrule the objection of the defendant, which was sustained by the district court, and to permit plaintiff's complaint to stand, granting him permission to amend his pleadings so as to conform to the views herein expressed.

Reversed and Remanded.

PEMBERTON, C. J., and BUCK, J., concur.

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21 210

STATE EX REL. SERES, v. DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT.

[Submitted May 4, 1897. Decided May 10, 1897.]

*Mandamus to Try Cause—Right of Appeal, on Refusal of
Medical Certificate.*

The laws of Montana provide for the examination of all persons desiring to practice medicine, —the examination to be held before the medical examiners. It is further provided that where a certificate is refused, the person aggrieved may appeal to the district court, and that such appeals shall be conducted as appeals from a decision of a board of county commissioners, which, it is further provided, "are prosecuted and tried like appeals from a justice of the peace." The law also provides that appeals from a justice's court are tried *de novo*. Held, that an applicant who has been refused a certificate, has a right to appeal to the district court, and on such appeal is entitled to a trial *de novo*.

BUCK, J., dissenting.

APPLICATION of state of Montana, on the relation of J. R. Seres, for mandamus against district court of the First judicial district of the state of Montana in and for the county of Lewis and Clarke. Writ awarded.

Statement of the case by the justice delivering the opinion.

This is an application for a writ of mandamus. The petitioner alleges that he is a regular graduate of an accredited college of medicine; that he attended at least four courses of lectures at said college, of six months each; that on the first Tuesday of October, 1896, petitioner was an applicant to the board of medical examiners for a certificate entitling him to practice medicine and surgery in the state of Montana; that a meeting of said board was held in Helena on the day aforesaid; that at said meeting the petitioner presented his diploma from said medical college, evincing his graduation; that said diploma was found by the said board of examiners to be genuine, and issued by a regular medical college, legally organized and in good standing; that he thereupon submitted to an examination in the various branches prescribed by law and the said board of examiners, and filed with the said board his examination papers, written upon the questions by the said board propounded in the said various branches; that thereupon said board denied the petitioner's application for a certificate to practice medicine and surgery in the state of Montana upon the ground that said examination papers showed that the petitioner had not the requisite learning to entitle him to such certificate; that, after being notified by said board of its determination not to grant this petitioner such certificate, he within 30 days duly appealed from the decision of the said board of medical examiners to the district court of the First judicial district of the state of Montana in and for the county of Lewis and Clarke; and that, after said appeal was duly taken to the district court, the said district court on the motion of the county attorney of the said county, and the attorney general of the state, dismissed the petitioner's appeal, upon the ground that the said court had no jurisdiction to try and determine the same. The petitioner asks for a writ of mandate in this proceeding, commanding the district court to reinstate his appeal and to proceed to the hearing and determination thereof.

On the return of the writ, the attorney general, for the said

district court, demurred to the petition for the reasons—First, that said petition does not state facts sufficient to entitle said petitioner to the relief prayed for; and, second, that said petition shows affirmatively that the action of the medical board in refusing to issue a certificate for the cause specified was final, and not subject to review by any appellate tribunal, and that said defendant (district court), in dismissing said petition, acted correctly and within its jurisdiction, in that no appeal lay from the action of the board to said defendant.

T. J. Walsh, for Relator.

C. B. Nolan, Attorney General, for Defendant.

PEMBERTON, C. J.—The only question presented here is this: Does the statute allow an appeal to an applicant who has been refused a certificate by the medical board authorizing him to practice medicine and surgery in this state on the ground that the applicant's examination papers show that he has not the requisite learning to entitle him to such certificate?

Counsel for the defendant, the attorney general, contends that the right of appeal exists only when the certificate is refused or revoked by the board for unprofessional, dishonorable or immoral conduct, and that no appeal lies from the refusal of the board to issue a certificate on the ground of the incompetency of the applicant.

That part of section 603 of the Political Code, which provides for appeals from the action of the medical board is as follows:

“In all cases of the refusal or revocation of a certificate to practice medicine by the said board, the person aggrieved thereby may appeal from the decision of the board to the district court of the county in which such revocation or refusal was made.”

Counsel for defendant contends that this provision only gives the right of appeal where the certificate is refused or revoked by the board for unprofessional, dishonorable or im-

moral conduct, and that *State v. District Court of First Judicial District*, 13 Mont. 370, 34 Pac. 298, in which this court discussed the right of appeal from the action of the medical board, does not go to the extent of deciding that an appeal lies in cases like the one at bar.

But, in examining our statute, we find no language that restricts the right of appeal to any particular class of cases. The terms of the statute are general, and give the right of appeal "in all cases of the refusal or revocation of a certificate to practice medicine by the said board." A number of the states have statutes like ours, but we are not referred to any decision of any of the states where the precise question here involved has been adjudicated and determined. The law provides that appeals in such cases shall be conducted like appeals from a decision of a board of county commissioners disallowing a claim. (Political Code, § 603.) Appeals from actions of boards of county commissioners are prosecuted and tried like appeals from a justice of the peace. (*Id.* § 4289.) Appeals from a justice court are tried *de novo*.

It is said by the counsel for the defendant that a trial of this case *de novo* in the district court would be impracticable, if not impossible; that the court or jury could not try and determine the question of petitioner's competency to practice medicine. It is further insisted that the law does not provide any procedure by which the district court could properly try and determine this question.

In *State v. District Court of First Judicial District*, *supra*, this court held that the right of appeal was not rendered nugatory because the law did not prescribe rules to guide the district court in trying such appeal. This was when there were no proceedings or rules prescribed by law for appeals in such cases. The present statutes do prescribe the manner of appeal, and, if the proceedings prescribed by the statute are inefficient, under the provision of section 205 of the Code of Civil Procedure, "any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the code." Awkward, difficult, and unsatisfactory

as a trial of this case in the district court might, and doubtless would, be, we are of the opinion that the learned district judge would be able to devise ways and means not incompatible with the code for disposing of the case.

Impolitic and unwise as this law may be, still, if the legislature has given the petitioner the right of appeal in this case, we have neither the right nor disposition to deprive him of its exercise by any unauthorized construction of the statute or by any apparent judicial legislation. Unless we construe or legislate something very material into the statute not placed there by the legislature, we think the petitioner, under the law, which is broad and general in its terms, is entitled to prosecute his appeal in this case.

Whether or not such laws are wise or unwise, politic or impolitic, are questions for the legislative branch of the government, and we have no right or inclination to invade that domain.

The order of the district court dismissing the appeal in this case is reversed, and a peremptory writ of mandate is ordered to issue, directing that the district court reinstate said appeal and proceed to the trial of the cause.

Reversed.

BUCK, J., dissents.

HUNT, J.—I concur in the conclusion reached by the chief justice. It will be observed, by section 602 of the medical law (Political Code), that after examination of a candidate's qualifications upon the subjects and in the manner prescribed, the medical board "shall, if the candidate has been found qualified, grant a certificate to such candidate to practice medicine and surgery in the state of Montana," etc. It naturally follows that, if they must grant one to a candidate who is qualified, by withholding one from a candidate who is found to be disqualified their action is equivalent to refusing to grant a certificate. It is a positive rejection.

The board is required to keep a record of all its proceedings, and also a register of all applicants for certificates,

showing certain facts, and this register must further show whether such applicant has been rejected under the law. (Pol. Code, § 601). To pass or reject a candidate alike requires the action of a quorum of the board,—four members. Without such a quorum, no board action can be had upon any candidate's examination papers or answers. The ascertainment of a candidate's incompetency is by the law just as positive an act, and demands just as much formality of antecedent proceeding, as does reaching the conclusion of his competency. In either case the board makes a finding of record. The fact that in one instance the result of the finding is rejection makes the action taken none the less an expressed refusal to grant a certificate than does their determination to pass a candidate make such action the expression of their intention to grant him a certificate.

I, therefore, think that relator's attitude is that of a candidate who, by having been rejected as disqualified, has been refused a certificate to practice medicine, and that the board's position is that of having made the decision of refusal. If this is so, he may appeal.

Section 603, in the first part thereof, pertains to the refusal to grant a certificate for unprofessional, dishonorable, or immoral conduct. All such powers vested in the board are in addition to those previously granted to pass or reject applicants. But the latter portion of section 603 preserves a general right of appeal to the person aggrieved in all cases of the refusal of a certificate to practice medicine. Were it not for the fact that this provision for an appeal "in all cases" of refusal is found in the latter part of the section, which in its previous provisions gives powers of refusal to issue certificates, or to revoke them for immoral, dishonorable, or unprofessional conduct, I apprehend there would be no serious question of the right to appeal in this instance; nor do I believe, in such an event, it could be contended that the words "in all cases" were limited by the context of any single section of the act.

It not infrequently happens that clauses of a law which are

in themselves clearly general in their pertinency and significance creep into the body of some particular section of the act, and thus provoke argument as to their intended place and use. Such things often happen by the legislature tacking on amendments to provisions in original bills introduced, or by careless engrossment or enrollment of bills passed by such bodies, or by mistake in compilation of the law for publication; but, if the words are explicit, or, even if they are not, if the intention of the law may be fairly gathered from the context, it is a court's duty to collect that intention.

To give the expression of the words of the particular clause extending the right of appeal to all cases of a refusal of a certificate to the aggrieved person their full and general significance, and to construe the clause which is remedial liberally, and withal to harmonize the provision with the whole statute, in my judgment, it is necessary to interpret them as applying generally to every case where the board refuses to grant a certificate by rejection for incompetency, as well as where they find immoral or unprofessional conduct.

The perplexities to possibly result from this construction are not so serious as counsel seem to think they may be. A similar right of appeal is given by statutes of many states, except that the appellate power lies in the governor instead of the court. But that is a matter of legislative will. Judges often have to pass upon equally difficult questions, involving study and knowledge of abstruse sciences; for the law, in its comprehensiveness, includes every branch of learning. When these difficult problems arise, however, courts are permitted to call to their aid those who are most proficient and experienced in the especial fields of knowledge being traversed, and to receive aid from expert witnesses by which they can be led to righteous judgments in the litigious affairs of men. Moreover, as a general proposition, a court will be slow to reach a conclusion different from the finding of the state medical board as to an applicant's competency to practice medicine, where satisfactory evidence sustaining the board's opinion is presented, and where no willful wrong or prejudice is charged

against the board or any of its members by the rejected candidate. It is probable, too, that appeals of this kind will be very rare; for a candidate who has been found disqualified for lack of requisite learning will generally choose to perfect himself, and try again by the usual method, rather than to incur the vexations and anxieties incident to an appeal to a court, which, after all, will have to be governed by medical men's opinions.

But, as the statute, in my judgment, has given the right of appeal to relator, if he wishes to use it and properly invokes it, the same power that has bestowed it—the legislature—is the only one that can deprive him of its exercise. I, therefore, must agree to the order reversing the case.

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SCHILLING, RESPONDENT, v. REAGAN, SHERIFF, ET AL.,
APPELLANTS.

[Submitted May 5, 1897. Decided May 17, 1897.]

*Judgment by Default—Action to Vacate—Foreign Corpora-
tion—Temporary Injunction—Discretion.*

SUMMONS—*Judgment by Default.*—A defendant in an action in a justice's court who appears generally in a motion to set aside a default alleged to have been improperly taken, and who, upon denial of the motion, appeals to the district court, where the appeal is dismissed, thereby waives any irregularity in the summons, and cannot maintain a suit to set aside the judgment on account of such irregularity.

JUDGMENT—*Action to Vacate.*—An action to vacate a judgment will not be sustained, when based upon grounds which could have been litigated in the former action.

SAME.—For the reason stated, an action will not lie to set aside a judgment obtained by a foreign corporation, because it has not complied with the state law regulating the right of such corporations to contract, etc., in this state, as this question could have been raised in the action in which the judgment was obtained.

TEMPORARY INJUNCTION—*Discretion.*—Although the granting of a temporary injunction is a matter of discretion, still that discretion must be sound, and is subject to review; and where it appears from all the facts that the order was improperly granted, it may be reversed on appeal.

Appeal from District Court, Silver Bow County. William Clancy, Judge.

AN ACTION by Adolph Schilling against P. H. Reagan,

sheriff of Silver Bow county, and others. Judgment for plaintiff, and defendants appeal. Reversed.

Statement of the case by the justice delivering the opinion.

The plaintiff in this action sued the defendants to annul a judgment of a justice of the peace rendered against him in Silver Bow county. It appears from the record that on the 26th day of August, 1896, the defendant Wagg-Anderson Woolen Company recovered a judgment by default against the plaintiff in this action before George H. Chapman, who was then justice of the peace in and for South Butte township, in said county, for the sum of \$42.05; that the defendant Ducie is the successor in office of said Chapman; and that the defendant Reagan is the sheriff of Silver Bow county. The record further shows that, after said judgment in the justice's court was rendered by default as aforesaid against the plaintiff in this case, he appeared in said justice's court, and moved to set aside the default on the ground of mistake; the alleged mistake being that the defendant Schilling was summoned to appear at 2 o'clock a. m. of the return day of said summons, instead of 10 o'clock a. m. The motion to set aside the default was supported by the affidavit of Schilling, his attorney, and his attorney's clerk. This motion was resisted on the affidavit of the constable, one Wedekind, who testified that a copy of the summons served upon Schilling did not contain the mistake sworn to by Schilling, his attorney, and his attorney's clerk aforesaid. The justice overruled plaintiff's motion to set aside the default, whereupon the plaintiff, Schilling, appealed to the district court of Silver Bow county. His appeal was for some cause dismissed by the district court, and the judgment of the justice of the peace affirmed, whereupon Schilling brought this action to annul the judgment of the justice of the peace, alleging the mistake in the summons, and the insufficiency thereof, upon which he relied in his motion to set aside the judgment rendered against him by said justice, and also on the ground that the Wagg-Anderson Woolen Company is a foreign corporation doing business in this state; that the

same had failed to file in the office of the secretary of state, or in the office of the county recorder of Silver Bow county, or any other county of this state, a duly-authenticated copy of its charter or certificate of incorporation, or statement verified by the oath of its president or secretary, or a majority of its board of directors, showing the name of such corporation, with the location of its principal office or place of business without this state, or the location of its principal office or place of business within this state, or the amount of its capital stock, etc., as required by law, or to designate as agent a citizen of Montana, or any person whomsoever upon whom service of summons might be had, and to do such other things as is required by law in relation to foreign corporations desiring to do business in this state; claiming that by reason thereof the said justice of the peace who rendered such judgment against this plaintiff had no jurisdiction to entertain said cause, or enter said judgment or any judgment against this plaintiff.

The judge of the district court of Silver Bow county issued a temporary injunction against the sheriff, restraining him from executing the execution issued out of said justice's court on said judgment in favor of the Wagg-Anderson Woolen Company against Schilling, as shown above.

Thereafter the defendants in this case moved the district court to dissolve the injunction on the ground that there were no sufficient grounds shown for the issuing thereof. The motion to dissolve was made upon affidavits showing all the facts contained in the statement of this case. The court denied the motion to dissolve the injunction, and from this order the appeal is prosecuted.

Hinkle & Shelton, for Appellants.

Carroll & Leehey, for Respondent.

PEMBERTON, C. J.—The only question presented by this appeal is as to whether the lower court erred in refusing to dissolve the temporary injunction issued in this case.

From the showing made by the defendants in support of their

motion to dissolve the temporary injunction, it clearly appears that the plaintiff, who was the defendant in the justice's court against whom the judgment now sought to be annulled was rendered, after the judgment was rendered appeared in said justice's court, and moved the court to set aside the same. This motion was heard and determined by the justice. The decision being against plaintiff herein, he appealed to the district court. For some reason his appeal to the district court was dismissed, and the judgment of the justice thereby affirmed. It thus appears that the plaintiff not only had a legal remedy by appeal to the district court from the judgment of the justice, but that he availed himself of it. Whatever defects there may have been in the summons issued by the justice were cured by Schilling's appearance, and moving the justice to set aside the judgment, and his subsequent appeal to the district court. (*Gage v. Maryatt*, 9 Mont. 265, 23 Pac. 337.)

The respondent says that his action to annul the judgment of the justice is based on two grounds, to wit, the alleged defect in the justice's summons, and the inability of the defendant corporation to maintain this action by reason of its failure to comply with the law of the state regulating the right of foreign corporations to contract and sue upon contracts in this state, as shown in the foregoing statement.

But in reply to this we may say that Schilling could have made this defense in the justice's court, if there is any merit in it, or he could have made use of this defense as a ground for setting aside the judgment in the justice's court. and had both these questions tried de novo in the district court on his appeal. So that whatever merit there may be in the contention that the claim sued on in the justice's court was invalid, and that the justice had no authority in law to enter judgment thereon, because of the corporation claimant having failed to comply with the law in relation to foreign corporations doing business in this state, we think it cannot avail the plaintiff in this action, for the reason given above.

The respondent in this suit contends that the court below

committed no error in refusing to dissolve the injunction, because, he says, this court has time and again held that the granting or refusing to grant a temporary injunction is a matter of discretion.

This court has frequently held that the granting of a temporary injunction in a proper case, and upon a reasonable showing, is a matter within the discretion of the lower court. But by "discretion" in such cases is meant a sound judicial discretion. We certainly have never held that it was a matter of discretion whether a district court would grant a temporary injunction in any and all kinds of cases, with or without a reasonable showing. When it appears from the nature of the case and all the facts that a party is not entitled to an injunction, the granting thereof is error, because unauthorized. The granting of an injunction is not, in such cases, a matter of discretion.

We think the court erred in refusing to dissolve the temporary injunction on the showing of the defendants.

The order appealed from is reversed, and the cause remanded, with direction to dissolve the injunction.

Reversed and Remanded.

HUNT and BUCK, JJ., concur.

STATE OF MONTANA, RESPONDENT, v. BERNHEIM,
APPELLANT.

[Submitted April 29, 1897. Decided May 17, 1897.]

*Common Carriers—Sale of Tickets—Statutory Regulations—
Constitutionality—Police Regulation.*

Session laws of 1893, page 150 (Civil Code, section 978-984) originated in the senate. The law provides that the owners of railroads or steamboats for the transportation of passengers shall provide each agent, who is authorized to sell tickets, with a certificate of his appointment, that "such agent — shall exhibit the same to the secretary of state, — and at the same time shall pay to the said secretary of state a

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license fee of one dollar" whereupon the secretary shall issue a license. *Held*, that the law is in the nature of a police regulation and is not for revenue purposes; and that therefore the fact that the bill originated in the Senate is not in violation of article 5, section 22, of the Constitution, which provides that all bills for raising revenue shall originate in the House of Representatives.

TITLE OF BILLS.—A title of a bill was as follows: "An act to regulate the sale and redemption of transportation tickets of common carriers." The act provides for a certificate of the appointment of agents to sell such tickets, and the issuance of a license, and that such certificate and license shall be posted for the information of travellers. The law also makes it unlawful for any person who is not in possession of such certificate and license, to sell tickets, and provides a penalty for violating that portion of the Act. *Held*, that the subject of the Act is clearly expressed in the title; and that the penalty imposed is merely an incident to the regulation of the sale and redemption of transportation tickets, which is the subject of the law.

Appeal from district court, Lewis and Clarke County. H. R. Buck, Judge.

J. BERNHEIM was convicted of the unlawful sale of a railroad ticket, and appeals. Affirmed.

Statement of the case by the justice delivering the opinion.

The defendant was informed against for having sold a railroad ticket in violation of the law. He was tried and convicted, and appeals from the judgment of conviction.

The law under which the defendant was convicted is entitled "An act to regulate the sale and redemption of transportation tickets of common carriers." Sess. Laws 1893, p. 150; also, sections 978 to 984, inclusive, of the Civil Code of Montana. Section 1 of the original law provided that the owner of any railroad or steamboat shall provide each agent who is authorized to sell tickets with a certificate setting forth the authority of such agent. If the owner should be a corporation, then such certificate must be under the corporate seal. It is the duty of the agent to keep the certificate conspicuously posted for the information of travelers. He must also, within 10 days thereafter, exhibit the same to the secretary of state, and, upon payment of a license fee of one dollar, the secretary of state issues to such agent a license under the seal of the state of Montana, which authorizes the persons so receiving the same to engage in the business of selling tickets of the common carrier from whom he holds his appointment. This license is also required to be kept conspicuously posted.

Section 2 makes it unlawful for any person who has not thus been appointed to sell tickets.

Section 3 provides a penalty for the violation of the second section of this act.

Section 4 makes it the duty of every agent so authorized to sell tickets to exhibit his authority to any officer of the law who may request him so to do.

Section 5 provides for the redemption of the unused portion of any ticket, and prohibits the sale by any person of such ticket, or of the unused portion of such ticket otherwise than by presentation for redemption under the terms of this act. A violation of the provisions of this act subjects the party offending to a specified penalty.

Section 6 provides a penalty for the unreasonable refusal of a railroad company or other common carrier to redeem its tickets, as required by section 5.

Section 7 makes it unlawful for any ticket-selling agent or common carrier to dispose of tickets at a greater or less price than the regular rate for the same.

Henry C. Smith and Thompson Campbell, for Appellant.

C. B. Nolan, Attorney General, for the state.

HUNT, J.—The appellant assails the validity of the act of the legislature under which the defendant was convicted. He does not, however, ask the court to declare it in violation of article 3 of section 27 of the constitution of the state, and the fifth amendment of the constitution of the United States, which provide that "no person shall be deprived of life, liberty or property without due process of law," but relies entirely upon these two propositions:

First. Because the bill was one for raising revenue for the state of Montana, and, it being conceded that it originated in the senate, he argues that it violates the provisions of article 5 of section 32 of the constitution of the state, which reads as follows: "All bills for raising revenue shall originate in the

House of Representatives, but the Senate may propose amendments as in the case of other bills.”

Secondly. Because the constitutional provision (section 23 of article 5 of the constitution of the state) requiring the subject of every bill to be clearly expressed in its title was violated at least to the extent of rendering the penalty clauses of the law void by the omission to include in the title sufficient references to those clauses of the bill which imposed a punishment for violation of the law.

The argument of counsel that the law under consideration is a revenue law is based upon the fact that a license fee of one dollar must be paid to the secretary of state for the license provided for in section 1 of the act. This fee must be paid by the agent of the railroad company (who is authorized to sell tickets) to the secretary of state, who in turn issues the license to the person authorized to engage in the business of selling tickets of the common carrier, from whom he holds his appointment as agent. It is contended that, because this license may become a source of revenue to the state, the law providing for this revenue is a revenue law, within the meaning of the section of the constitution referred to.

The first clause of section 32 of article 5 of the constitution of Montana, in its requirement that “all bills for raising revenue shall originate in the House of Representatives,” is identical with the language of section 7 of article 1 of the constitution of the United States, while the remaining clause, permitting amendments by the senate, is substantially similar to a like clause of the federal constitution. This exclusive right of the House of Representatives to originate bills for raising revenue having been obviously borrowed from the federal constitution, into which, Judge Story says, it found its way originally from similar privileges exercised by the British House of Commons, we naturally turn to the construction of similar words by the federal courts, in order to learn their views of what are properly “bills for raising revenue.”

In the case of *U. S. v. Mayo*, 26 Fed. Cas. 1231, decided in 1813, Judge Story, in discussing liability for penalties under the embargo acts, used this language:

“It is argued that the present is a case arising under the revenue laws of the United States, and that in an enlarged sense these words embrace all laws where any fine or forfeiture accrues to the government. I have no difficulty in rejecting this construction, as it would draw within its grasp every crime to which a pecuniary fine or forfeiture attaches by law, of whatsoever character it might be; and I might add that not a single law inflicting a forfeiture would escape its comprehensive power. The true meaning of ‘revenue laws’ in this clause is such laws as are made for the direct and avowed purpose for creating and securing revenue or public funds for the service of the government. No laws whose collateral and indirect operation might possibly conduce to the public or fiscal wealth are within the scope of the provision. The argument on this head therefore utterly fails.”

Story, years afterwards, in his treatise on the Constitution (section 880), again wrote as follows:

“What bills are properly ‘bills for raising revenue,’ in the sense of the constitution, has been a matter of some discussion. A learned commentator supposes that every bill which indirectly or consequentially may raise revenue is, within the sense of the constitution, a revenue bill. He therefore thinks that the bills for establishing the postoffice and the mint and regulating the value of foreign coin belong to this class, and ought not to have originated, as in fact they did, in the senate. But the practical construction of the constitution has been against his opinion. And, indeed, the history of the origin of the power already suggested abundantly proves that it has been confined to ‘bills to levy taxes’ in the strict sense of the words, and has not been understood to extend to bills for other purposes, which may incidentally create revenue. No one supposes that a bill to sell any of the public lands, or to sell public stock, is a bill to raise revenue in the sense of the constitution. Much less would a bill be so deemed which merely regulated the value of foreign or domestic coins, or authorized the discharge of insolvent debtors upon assignments of their estates to the United States, giving a priority

of payment to the United States in case of insolvency, although all of them might incidentally bring revenue into the treasury."

This construction by Judge Story has been expressly approved by the supreme court in *U S. v. Norton*, 91 U. S. 566. See also, *The Nashville*, 4 Biss. 188, Fed. Cas. No. 10,023.

Tested by these rules, we are clearly of the belief that there is nothing in the context of the bill to justify the opinion that the motive of the legislature in passing it was to raise revenue for the state. The more general object of the law, as expressed by its provisions and title, was to regulate the sale of railroad and steamboat transportation, limiting the right of sale of tickets to those designated as agents by the carriers, to the end, doubtless, of preventing violation of agreements under which transportation companies often sell their tickets to original purchasers, and to prevent fraudulent practices upon the public as well, and to provide for the redemption of certain tickets or coupons by carriers.

We need not dwell upon that feature of appellant's argument that the license charge or fee for the transaction of the business of an agent is a tax, as the word "tax" is employed in section 1 of article 12 of the constitution, which provides that "the legislative assembly may also impose a license tax both upon persons and upon corporations doing business in the state," designed to raise money for public purposes.

The statute not being for revenue purposes, we regard it as a police regulation, adopted by the legislature in the exercise of the police power, and certainly not in conflict with the constitutional provision which the appellant says it violates.

As said before in this opinion, the question whether or not the law itself violates the United States and state constitutions by attempting to deprive a man of his "property" without due process of law is not presented for our consideration, and we have assumed throughout that, unless the points relied on by appellant are well taken, the law is valid, and must be upheld.

Nor is there merit in the point that the subject of the act is not clearly expressed in the title. The subject of the law is the regulation of the sale and redemption of tickets. As an incident of regulation, penalties are provided against violation of the law. The provisions for these penalties are part of the methods for the regulation—means whereby the regulation may be effectuated.

Experience amply demonstrates that to regulate a particular business by law, and put a statute regulating it into practical and effective operation, there must be punishments prescribed and imposed upon those who violate its commands. But such penalties need not be included in the title, for they are but "ends and means necessary or convenient for the accomplishment of the general object." (Cooley, Const. Lim. p. 172; *Insurance Co. v. Raymond*, 70 Mich. 485, 38 N. W. 474; *Canal Co. v. Bright*, 8 Colo. 144, 6 Pac. 142; *State v. Stunkle*, 41 Kan. 456, 21 Pac. 675; *Howell v. State*, 71 Ga. 224. The judgment is affirmed.

Affirmed.

PEMBERTON, C. J., concurs. BUCK, J., disqualified.

THE STATE OF MONTANA, EX REL. THE GREAT
FALLS WATER WORKS, APPELLANT, v. THE
MAYOR AND CITY COUNCIL OF THE
CITY OF GREAT FALLS, AND THE
CITY OF GREAT FALLS, RE-
SPONDENTS.

[Submitted May 3, 1897. Decided May 17, 1897.]

*Municipal Corporations—Powers—Debts—Loans of Credit—
Constitutional Limitation—Contracts—Validity—Acceptance—Waiver—Estoppel—Taxes—Mandamus—When Lies—Records—Pleading—Water Companies—License.*

Compiled Statutes 1897, section 345, forbidding a mayor to be interested directly or indirectly in the profits of any city contract entered into while he is in office, does not ap-

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ply to a mayor who was not interested in a contract made with the city, but who agreed, after the contract was accepted and filed with the proper official, to take stock in a corporation succeeding to the rights of the original contractors.

Where contractors with a city for a water supply did not file their acceptance within the time prescribed by the ordinance, but the city, without objecting, allowed them to erect the works and supply water for several years according to contract, it waived any defect in acceptance.

A city granted an exclusive right to supply water for a term of 15 years, at fixed hydrant rates. The grantees erected waterworks, issued and sold bonds, and supplied the city with water according to contract for 7 years, when the city repudiated that part of the contract fixing rates, and insisted on a continued supply at lower rates. *Held*, on mandamus by the grantees to compel the levy of a tax to pay contract rates overdue, that the city could not be heard to say that the contract was void because the grant was exclusive, or for an unreasonable length of time at fixed rates, or unwise on the part of the city.

Laws 1889, page 185, section 16, amending Compiled Statutes, section 415, so as to provide that the amount of taxes to be levied in any one year in any city or town for water purposes shall not exceed one-half of 1 per centum, etc., became part of an ordinance contract for a water supply, made and accepted while it was in force, so that the contractors had a right to insist that, so far as necessary to pay rentals due them according to contract, a special tax should be levied annually, not to exceed the specified limit.

In view of laws 1889, page 185, section 16, amending Compiled Statutes section 415, so as to provide that the amount of taxes to be levied by a municipality for water purposes shall not exceed a certain per cent., etc., and thereby making liabilities of municipal corporations for water rentals under contracts with water companies payable out of a special fund, such liabilities are not debts, within the constitutional limitation.

An agreement of a city in a contract with a water company to pay to the company's bondholders the money due or to become due from hydrant rentals, or as much as necessary to pay interest on the bonds, and the signing on behalf of the city of a certificate to that effect on the back of the bonds, is not a loan of credit by the city, in violation of act of congress 1886, section 2 (Compiled Statutes of Montana, page 82.)

Code of Civil Procedure 1886, section 1961, provides that mandamus may issue to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station; and section 1962 provides that the writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. *Held*, that mandamus was the proper remedy to compel a city to levy a special tax to pay ascertained water rentals due under a valid contract for a water supply, which contract the city had repudiated.

The city could not dispute its records as to the number of hydrants for which rentals were due under the contract, in the absence of an averment in the return laying a foundation therefor.

In the absence of an averment in the return to support its admission, evidence that the water company had no license to carry on its business was also properly excluded.

Where a city repudiates a contract with a water company providing for payment of hydrant rentals semiannually, but still uses the water furnished by the company, and insists that the supply be continued regardless of the contract, a command in a writ of mandamus, that the city levy sufficient taxes to pay, not only the six months' water rentals already due, but also those that will become due for the remaining six months of the year, is proper.

Appeal from District Court, Cascade County. Dudley Du Bose, Judge.

MANDAMUS by the state, on the relation of the Great Falls Waterworks, against the mayor and city council of the city of Great Falls, and the city of Great Falls. A peremptory writ

issued, and from an order granting a new trial relator appeals. Reversed.

Statement of the case by the justice delivering the opinion.

On March 26 and 27, 1889, while Montana was a territory, Ordinance No. 17 of the city of Great Falls was passed and approved. It embodied the terms of a contract between said city and one T. E. Collins and others for the construction of a waterworks system. It granted to said parties and their associates and assigns the exclusive right of laying pipes and mains in the said city, and of supplying water by means thereof to it and to its inhabitants for a period of 20 years. It gave the city the option of purchasing the waterworks plant at any time after the expiration of 15 years, and before the termination of 20 years; and, in the event that no purchase thereof should be made by the city, it provided that the contract should be renewed for an additional period of 20 years. It designated a certain point in the Missouri river from which water should be taken. It required the laying and maintenance of 7 miles of mains, with 75 hydrants at the outset, and extensions of mains and pipes in such streets as the city council might direct from time to time, with an additional hydrant for each one-tenth of a mile of extended mains. The city reserved the right to govern by ordinance the general use of all hydrants, and the right of such reasonable control thereof as might be necessary to a beneficial use of the water for fire and sewerage purposes. It provided that, upon a failure of the parties contracted with and their assigns to repair any hydrants within 24 hours after notice of the necessity of repairs, the city could proceed to do so, and might deduct the cost thereof from the next water rental to be paid by the city. It was agreed that the city should pay for the first 75 hydrants at the rate of \$90 per annum for each, and for each hydrant ordered and placed thereafter at the rate of \$60 per annum. Payments were to be made semianually, on May 1st and November 1st. It contained this language:

“A sufficient tax shall be levied and collected annually upon

all taxable property upon the assessment roll of said city subject by law to such tax, to meet the payments under this ordinance when and as they respectively mature, during the existence of any contract for hydrant rental, which tax shall be irrevocable from and after the passage of this ordinance."

Section 27 of the ordinance provided that, if Collins and his associates and assigns should issue any bonds secured by mortgage or trust deeds on the waterworks, the money due or to become due for any hydrant rental, or as much thereof as might be necessary, should be appropriated to the payment of the interest on said bonds, and authorized the mayor and city clerk to sign a certificate on the back of any such bonds to that effect. The ordinance also provided for the filing of a written acceptance of the terms of the contract by said Collins et al. within 10 days after its approval.

Collins and his associates, after a compliance with the terms of the ordinance, so far as was requisite, organized a corporation known as the "Great Falls Water Company," on March 27, 1889, and assigned to it all their rights and franchises. One of the stockholders in this corporation was Paris Gibson, the mayor of the city at the time the ordinance was passed. The city was formally notified and acquiesced in this transfer. The Great Falls Water Company put in a water plant pursuant to the contract. The city accepted it, and paid the rentals agreed upon as they fell due.

On or about May 1, 1891, the corporation issued and disposed of bonds to the extent of \$150,000, securing the same by a trust deed on all its property. These bonds were duly indorsed by the city officials pursuant to section 27 of the ordinance *supra*, and the money realized from the sale thereof was expended upon and in connection with the water plant. The company operated the waterworks until the 1st day of May, 1893, when it transferred all its franchises and property to the Great Falls Waterworks, a corporation organized for the purpose of operating the waterworks. Again the city council was notified, and duly accepted this corporation as the assignee and successor in interest of the Great Falls Water

Company. On May 1st the new corporation issued bonds payable in 20 years, to the extent of \$500,000, securing the same by a trust deed executed to the Illinois Trust & Savings Bank, a corporation. Again, the city officials, pursuant to section 27 of the ordinance *supra*, duly indorsed these bonds. Of this last issue of bonds, \$150,000 were used for the purpose of retiring the bonds issued by the Great Falls Water Company. Another \$150,000 worth of these bonds was also disposed of.

Prior to November 1, 1895 (as shown by the minutes of the city council), under the direction and acceptance of the city council, the water mains had been extended to such an extent that there were 251 hydrants in the city. On May 1, 1896, the city council duly allowed and paid the presented claim of the Great Falls Waterworks for the six months' rental of 251 hydrants, at the rates prescribed in the ordinance contract, namely, \$90 each for the first 75 hydrants, and \$60 each for the remaining 176. On May 13th the council duly enacted an ordinance as required by the laws of the state, in which, among the other sums to meet the current expenses of the city, there was appropriated the sum of \$17,390 for water and fire purposes. In August, 1896, at the time prescribed by law for the levying of its taxes, the city, through its council, levied a two-mill tax only for water purposes. On or about October 2, 1896, the water company presented to the city an itemized bill for the rental of the 251 hydrants which would be due for the six months ending November 1, 1896. At a meeting of the council held on October 5, 1896, the bill was considered and acted upon. Its auditing committee, to whom it was referred, presented the following report upon the claim:

“We find the following to be the facts: The assessed value of the city property, taken the current year, is \$5,541,103. The limit of indebtedness, as allowed under the present law, is three per cent. of that amount, or \$166,233. According to your books, the outstanding indebtedness amounts to approximately \$200,000, a sum in excess of the limit set by

law. Accordingly, the council will be limited in its annual expenditure to the amount of cash on hand, plus the amount received from annual receipts from taxes and licenses. Applying this principle to the claim on hand, we find cash in the treasury, available for water fund purposes, \$540.92; taxes not yet collected, but approximately correct and probable, \$11,082.20—total to be expended during the year ending May 1, 1897, for water purposes, \$11,623.12. We, your committee, acting upon this information, and believing that the council has no right to expend money which it does not possess, or has no reasonable expectation of possessing, do recommend that the above-named sum be divided into two equal parts, the first half to be paid upon the present bill, and the remainder to be paid on the first day of May, 1897. The conditions of payment are embodied in the resolution herewith presented:

“ *Resolved*, that the claim of the Great Falls Waterworks for six months’ hydrant rental, ending Oct. 31st, 1896, be disallowed in the sum of \$2,245.47, and allowed in the sum of \$5,811.56, and that a warrant be issued on the city treasurer, payable out of the water fund, for said \$5,811.56, and be tendered to said Great Falls Waterworks, as payment in full for said six months’ hydrant rental.”

The said report of the auditing committee and the resolution contained therein were adopted by the city council. Subsequently, on November 2, 1896, the water company having again presented its bill for hydrant rentals due for the six months’ period ending November 1st, the council took identically the same action it had taken upon the same bill at the prior meeting; its auditing committee having reiterated its previous report thereon, and having recommended the identical resolution in reference thereto previously adopted.

On November 4, 1896, the Great Falls Waterworks, on affidavit of its president, applied to the district court of Cascade county for a writ of mandamus to be directed to the city council of Great Falls. An alternative writ of mandamus was issued, which recited many of the facts heretofore stated,

and also contained other allegations. The writ commanded the city council at its first regular meeting to audit and allow the claim of relator for the rental of 251 hydrants from May 1, 1896, to November 1, 1896, at the rate specified in said Ordinance No. 17, and directed that the mayor thereupon should issue a warrant to said relator for the sum of \$8,655 and interest, payable out of the water fund only. It also commanded that the city council should levy and collect sufficient taxes to pay for the rental of said 251 hydrants for what was due thereon, and what would be due for the fiscal year commencing the first Monday in May, 1897, and ending the first Monday in May, 1898. The writ required cause to be shown on November 16, 1896, why its commands should not be obeyed. No demurrer was interposed.

The return or answer of defendants to this alternative writ admitted that water mains, original and extended, had been laid in the city by relator and its predecessors under the orders and directions of the city council to the extent alleged. It denied that the amount of money had been expended which the writ alleged had been expended in and about relator's water plant, and averred that a much less amount of money than was expended would have sufficed for the construction and expenses connected with said plant. It alleged that the stock in the Great Falls Waterworks Company had not been paid in full by the holders thereof. It denied the allegation of said writ that the amount of money which would be received by the relator on account of water furnished private consumers for the year 1896 would be insufficient to meet and discharge the interest on the outstanding bonded indebtedness of the relator and its operating expenses. Defendants further denied that there had been placed, in connection with the water plant and system, 251 hydrants prior to the 1st day of November, 1895; denied that any such number of hydrants had been accepted or since maintained by the relator; and alleged that the total number of hydrants placed upon or in connection with said water system on or prior to the 1st day of November, 1895, was 250 hydrants. The answer further

averred that 3 of said 250 hydrants were placed and had been maintained wholly outside of the limits of the city of Great Falls without authority. It alleged that, of the remaining 247 hydrants, 6 were placed in an addition to the city of Great Falls, under an express agreement with the city that no charge should be made for the same prior to the 1st day of May, 1897. It also alleged that, of the 241 remaining hydrants, 13 had been placed below the surface of the ground, so as to be inaccessible for fire purposes. It averred that prior to May 1, 1896, relator had been ordered to place said 13 hydrants in proper condition, but had failed and refused to do so. It averred that in the spring of 1896, for a period of 60 days, relator had failed to furnish, to the inhabitants of the city, water fit and suitable for domestic use, and had made no provision at periods of high water in the Missouri river for furnishing private consumers with wholesome water.

It alleged that, at the time the contract was entered into, the future of the city was most promising (setting forth in detail the reasons therefor), and that at such time the city could have entered into a more favorable contract than the one contained in Ordinance No. 17. It set forth that the city of Great Falls had exceeded the limit of indebtedness permitted by the constitution of the state, and had no authority to levy and collect the taxes for water rentals as prescribed by Ordinance No. 17. It alleged that an agreement had been entered into by the persons named as grantees in the ordinance and Paris Gibson, at that time mayor of the city, whereby each of said persons, including said mayor, should be an equal owner of the franchises, privileges, and contract rights to be granted, and should organize a corporation to which should be transferred all the said rights, etc. It alleged that Collins et al. and the mayor, Gibson, influenced the city council to pass the ordinance aforesaid, and that the same was approved by its mayor, Gibson while an interested party. It averred that the various members of the city council who had allowed and paid the hydrant rentals to relator and its predecessors had done so without any knowledge on their part of the said

agreement on the part of Gibson, and of his interest in the original water contract. It alleged that, by reason of the facts aforesaid, as well as upon other grounds, the said original water contract was void.

It averred inability on the part of the city to allow relator the amount claimed for hydrant rentals, and at the same time operate its city government, setting forth in detail the expenses necessary for the operation of its government. It denied the allegation that the only reason for disallowing the claim presented by relator was the fact that the city had not sufficient money in the water fund to pay the full amount of hydrant rentals prescribed by the ordinance, and alleged that, in allowing a portion of said claim and disallowing a portion thereof, the council had acted in good faith, in the belief that the amount allowed for water furnished was a full and adequate compensation for the same, and was all that the relator was legally entitled to receive. It further alleged that under the terms of the bonds issued and secured by trust deed to the Illinois Trust & Savings Bank, a corporation of Illinois, it (the city) was required to pay to said last-named corporation any sums due for hydrant rentals to the relator on the interest account of said bonds, and averred that interest due thereon in excess of what relator claimed to be due from the city had not been paid by relator. It further alleged that there was a defect of parties plaintiff to the action, in that the Illinois Trust & Savings Bank was a necessary party to the action.

The cause came on for trial on the 7th day of December, 1896. The district court (Judge Benton presiding), on December 21, 1896, found in favor of relator, both as to the law and facts, on all issues on which evidence was admitted, and ordered a peremptory writ of mandamus as prayed.

Subsequently, the defendants moved to set aside the findings of the court, and for a new trial, upon the following ground: "Errors of law occurring at the trial, and excepted to by the defendants at the time." The motion was made on a bill of exceptions. It appears from the bill of exceptions that, upon the trial of the suit, the defendants objected to the

introduction of any evidence in support of the alternative writ of mandamus.

First, because of a defect of parties.

Second, because no cause of action was stated for a writ of mandamus.

Third, because the relator had a plain, speedy and adequate remedy at law, by suit against the city.

Fourth, because it appeared on the face of the writ that the claim of relator had been already audited and disallowed.

Fifth, because it did not appear on the face thereof that the claim sued on for water rent had ever been presented to the council for allowance, in accordance with the provisions of section 4808 of the Political Code 1895, requiring that "no money must be paid to any person claiming under a contract with the council, until such person has first filed with the clerk a statement under oath, disclosing the names of all persons directly or indirectly interested in the contract, or the proceeds or profits thereof, and declaring that no persons other than those named are interested in the same."

Sixth, because, the business of relator being a business that cannot be lawfully conducted except under a license first issued therefor, the alternative writ is insufficient in not alleging that the relator, at the time of the furnishing of the water, was or is now entitled to conduct the business of furnishing water to the city, or to any one else, because it does not appear that the relator had been licensed to conduct the business of a water company either under the city ordinances or the statutes.

Seventh, because, upon the facts stated in the alternative writ, it appears that Ordinance No. 17 is void, because to give it effect would be to create a monopoly and an exclusive right and privilege.

Eighth, because it further appears from the allegations of said writ that Ordinance No. 17, in so far as it purports to confer the right upon the grantees therein named, their successors and assigns, to compensation for the period named for hydrant rental at the rates fixed, is and was *ultra vires*, and beyond any express or implied power on the part of the city council to enact it.

Defendants also moved to dismiss the alternative writ upon the ground "that the record now shows that there is a controversy between the Great Falls Waterworks and the city of Great Falls, over the question of the amount of money due for water furnished, and concerning other facts essential for the council to determine when acting as an auditing body in allowing and disallowing the claim."

These objections and this motion were denied by the court. An objection of defendants was overruled, and an exception saved to the admission in evidence of the minutes of the council, for the purpose of showing that the city council had accepted 251 hydrants.

At the trial, the defendants offered to show by the records of the minutes of the city council that at a meeting held on April 12, 1889, the acceptance in evidence was brought up for consideration, and that, on motion, the acceptance was received and placed on file. An objection to this evidence as immaterial was sustained. Defendants then offered to amend their answer so as to allege that the grantees did not file their acceptance provided for in said ordinance until the 12th day of April, 1889. Leave to amend was denied.

As shown by the bill of exceptions on which defendants moved to set aside the findings of fact and for a new trial, the only issue upon which the district court allowed defendants to introduce evidence at the trial was that as to the participation of Mayor Gibson in the procurement of the water contract from the city while an interested party. It also appears that the defendants attempted, on cross-examination, to show that relator had no license, city or county, to carry on its business. The answer contained no allegation as to whether relator had a license or not. An objection, being interposed, that the evidence sought to be introduced in respect to a license was not proper cross-examination, was sustained.

The motion for a new trial was heard by Judge Du Bose, who, after taking the matter under advisement, on February 19, 1897, granted a new trial. The reasons assigned therefor in his written opinion were in substance that mandamus was

not the proper remedy to be invoked by relator, inasmuch as it had a plain, speedy and adequate remedy at law, and that the city council, in disallowing the claim, acted within the scope of its authority. The appeal is from the order made by Judge Du Bose granting the new trial.

John B. Clayberg, B. P. Carpenter, W. W. Phelps, I. Parker Veazey and W. T. Pigott, for Appellant.

Sam Stephenson and Cullen, Day & Cullen, for Appellees.

BUCK, J.—Winnowing the grain of this controversy,—distinguishing the substance from the shadows of law invoked,—the vital issues are less numerous than the many questions elaborately discussed in brief and argument seem to indicate.

It is apparent from the record that, in the refusal of the city council of Great Falls to allow relator's claim for hydrant rentals, the actual motive was to repudiate the water contract, because it had grown burdensome, through changed financial conditions. It is also manifest that the district court which granted the motion for a new trial acted solely on the theory that relator's remedy for its alleged wrong was not mandamus. While it is true as a general proposition that a correct decision or ruling will not be disturbed on appeal, even if the reason announced for the same is erroneous, nevertheless an appellate court is under no compulsion to grope in speculation for a possibly good reason. Therefore, in the determination of an appeal, a reason explicitly given for its ruling or decision by an inferior tribunal is always entitled to more consideration than mere possibly good reasons subsequently conceived or urged. If a false reason is given, the sound one supporting it should be clearly apparent and readily supplied. Were it otherwise, ingenuity in mere idle argument would result, and doubt would be encouraged for the sake of mere doubt. Hence we propose to deal very briefly with many of the objections raised.

Was the water contract void for fraud in its inception? The judge who tried the case found that Paris Gibson, the

mayor of the city of Great Falls, at the time Ordinance No. 17 was passed and approved, was not interested in the water contract, and there was evidence to support the finding. The fact that Gibson, while mayor of the city, had agreed (after the acceptance of the contract filed with the proper city official, on April 9, 1889) to take shares of stock in the corporation succeeding to the rights of the original parties contracted with, did not render this contract void, under sections 345 and 347 of the Compiled Statutes 1887, forbidding a mayor or alderman to be a party to any city contract, or to be interested in the profits of any such contract entered into while he was in office. Now, whether the city of Great Falls might be affected by any breach of trust on the part of its mayor in connection with such a contract, or any violation of law declared by statute to be a breach of trust, it is unnecessary to discuss. The allegations in the answer as to Gibson's connection with the passage and approval of the ordinance are indefinite in character. It is averred that Ordinance No. 17 was caused to be passed by Collins et al. and Gibson, and that, through their united influence, the city was induced to enact the same. It is not averred that Gibson as mayor voted for the ordinance. Under the statutes in force at the time, he would not, as mayor, have had a vote in the proceedings of the council, unless there had been a tie.

The defendants offered to prove by the minutes of the city council that the acceptance of the ordinance (which was admitted by the answer to have been filed within time, but which, upon the trial, was shown to have been filed two days later than the time prescribed by the ordinance) was not considered by the city council until April 12th, at which meeting the acceptance was received and placed on file. Objection was made on the ground of immateriality and sustained. The defendants then offered to amend the answer by alleging that the grantees in the ordinance did not accept its provisions until the 12th day of April, 1889. The court refused to allow this amendment. It is true that the city might at the time have objected that the acceptance had not been filed within the

10 days prescribed, but it did not do so. It allowed the construction of the waterworks in accordance with the terms of the ordinance, and proceeded to use and enjoy the water furnished thereby. For a number of years the ordinance was treated as valid and binding in every respect. There was no suggestion in connection with the evidence offered that Gibson had or could lawfully have voted as to the acceptance at the meeting held on April 12th. Under these circumstances, there was a waiver of any defect so far as the acceptance was concerned.

Was the contract void because it granted an exclusive right or fixed the hydrant rates for an unreasonable length of time?

It is to be borne in mind that there is no one in this proceeding claiming under any right conflicting with the relator's to supply the city of Great Falls and its inhabitants with water. The attitude of the city is simply this: It desires and contemplates a continuance of the use of the water supplied by relator, but insists upon such use upon its own terms, regardless of the original contract. The situation is entirely different from what it would be were the exclusive or unreasonable feature of the franchise being attacked prior to the performance of the terms of the contract. Contracts establishing fixed rates of payment, or granting exclusive rights for a long term of years to supply the needs of cities, should be always closely scrutinized by the courts when directly attacked, before substantial rights have vested through performance. It is true, the question for what length of time a city council may lawfully enter into such contracts depends largely for its answer upon the facts and conditions involved in each particular case. Respondents contend that, for the last-mentioned reason, the trial court should have allowed them to show the promising future of the city at the time the contract was entered into, and the probability that a much more favorable water contract could have been obtained. But what if it had been shown the city officials acted unwisely as to the terms of the contract? Rights have vested through the performance of many of said terms. No fraud is alleged, or even

suggested, on the part of the members of the city council, other than the mayor, in entering into this contract. From March 27, 1889, up to August, 1896, for a period of more than seven years, no objection was raised (so far as the record discloses) in any manner to this contract. Bonds had been issued on the water company's plant, and money realized from the sale of bonds expended thereon. There was no error in the exclusion of this evidence.

Respondents urge: "Counsel for appellant seem to contend that we cannot now raise the defense of unreasonableness of contract. If this were a proceeding for the payment of past hydrant rentals alone, there would be some force in the proposition. But this is more. This proceeding is brought to obtain, and the trial court granted, a mandamus to compel not only an allowance of the claim for past-due rentals, but also to compel the levy of a tax and an appropriation of sufficient money to pay rentals maturing for the year ending May 1, 1898. If this is to be upheld, it is only on the theory that the contract is valid for the entire period of time covered by its terms."

The city in this proceeding is not seeking to use water to be supplied by other means than the relator's plant. It neither contemplates or suggests the supply of water to it by other means; and no rival in the water business seeking the patronage of the city, attacks this contract under a right or privilege antagonistic to it.

The city virtually accepts the results of this contract in part—so far as they are beneficial to it—even while protesting that it is void *ab initio*. In *Davenport v. Kieinschmidt*, 6 Mont. 502, 13 Pac. 249, it was held that an ordinance of the city of Helena was void because it granted the exclusive right to supply said city with water for fire and sewerage purposes at fixed rates for a period of 20 years. The court granted a perpetual injunction at the prayer of certain taxpayers, to prevent the carrying out of the terms of the ordinance. But this was done before any work had been commenced under the contract embodied in the ordinance. For special reasons in

that case, it was not determined whether the Helena ordinance was severable in respect to what was valid and what invalid in its provisions. We do not deem it necessary to decide, under the existing condition of facts presented by this appeal and the law applicable thereto, whether the exclusive 15-year privilege granted in Ordinance No. 17 is void or not, either on the ground of monopoly or unreasonableness of time in prescribing fixed hydrant rentals. The city is estopped in its individual capacity by its present attitude from availing itself of this defense.

Nor is it necessary to determine any question which may arise in the future as to whether the relator can insist upon a renewal of the ordinance contract at the expiration of the 20 years prescribed therein, if the city of Great Falls does not purchase this water plant. We must decide the controversy only on the phase of it as presented at this time.

The law as announced in the case of *Illinois Trust & Savings Bank v. City of Arkansas*, City, 76 Fed. 271, 22 C. C. A. 171, is peculiarly applicable in many respects to the present case. We quote from it the following applicable language:

“Moreover, the city is in no position in this case to insist upon the invalidity of the exclusive character of this grant, if that could avoid its entire contract. The city is not endeavoring to construct waterworks or to lay pipes in its streets in violation of its exclusive grant to the gas company, nor is any one attempting to do so under its license or by its permission. No one seeks to infringe this exclusive grant. In practical effect it stands unchallenged, and may ever continue to be so. Until it is challenged by the act or endeavor of some one who seeks to infringe it, its validity or invalidity is a moot question, on account of which the courts ought not to, and will not, avoid any part of the contract. No one who does not infringe or threaten to infringe the exclusiveness of the grant in a contract made by a municipality can, after the substantial performance of the contract by the grantee, be heard to say that the contract or grant is void on account of the exclusive

character of the latter. [Authorities cited.] But it is insisted that this contract is beyond the powers of this city, and void, because it grants the right to use the streets of the city to the water company, and promises to pay rental for the hydrants, for twenty-one years. The proposition on which this contention rests is that the members of the city council are trustees for the public; that they exercise legislative powers; and that they can make no grant and conclude no contract which will bind the city beyond the terms of their offices, because such action would circumscribe the legislative powers of their successors, and deprive them of the right to their unrestricted exercise as the exigencies of the times might demand. There are two reasons why this proposition cannot be successfully maintained in this case: First, it ignores the settled distinction between the governmental or public and the proprietary or business powers of a municipality, and erroneously seeks to apply to the exercise of the latter a rule which is only applicable to the exercise of the former. A city has two classes of powers: The one legislative, public, governmental, in the exercise of which it is a sovereignty, and governs its people; the other, proprietary, quasi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality. In the exercise of the powers of the former class, it is governed by the rule here invoked. In their exercise, it is ruling its people, and is bound to transmit its powers of government to its successive sets of officers unimpaired. But, in the exercise of the powers of the latter class, it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants; and it may exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules that govern a private individual or corporation. [Authorities cited.] In contracting for waterworks to supply itself and its inhabitants with water, the city is not exercising its governmental or legislative powers, but its business or proprietary powers.

The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city itself and its denizens. Second. The powers granted to this city by the legislature of the state of Kansas to contract for and procure waterworks are plenary and unlimited, save by the duty to exercise them with reasonable discretion; and it is not the province of a court to contract or clip the legislative grant."

We are satisfied that these reasons apply generally to this appeal.

The case of *Davenport v. Kleinschmidt*, *supra*, refers to the distinction between the character of a city considered in its individual and its governmental capacity. See page 534, 6 Mont., and page 256, 13 Pac. The court expressly refused to hold the Helena ordinance void, because it restricted the future legislative powers of the city council.

Appellant says, in its brief:

"In the case of *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249, the court distinguishes the cases of *Burlington Water Co. v. Woodward*, 49 Iowa, 59, and *Grant v. City of Davenport*, 36 Iowa, 401, and uses the following language: 'In all of the water cases arising in the state of Iowa, we are met with a general statute which authorized all cities to contract for the erection of waterworks, and to pay for the water used by special fund, raised by a special annual tax, not to exceed five mills on the dollar; and such contracts with water companies were held not to create a debt against the cities, because the water companies would never have any general claim against the cities, but were held to look to the special fund alone for the satisfaction of their demands.' After the decision in this case, and in the year 1889, the legislative assembly of the territory of Montana passed the act hereinbefore quoted, conferring upon cities the power to levy and collect a tax not to exceed five mills on the dollar for fire and water purposes."

The act of the legislature referred to (See Sess. Laws 1889, p. 185, § 16), is as follows:

"That section four hundred and fifteen, as amended by 'An

act to amend an act relating to the formation of municipal corporations,' be amended so as to read as follows: 'Section 415. The amount of corporation taxes to be assessed and levied in any one year on the taxable property of any city or town for general municipal or administrative purposes shall not exceed three-fourths of one per centum, and for fire and water purposes one-half of one per centum on the assessed valuation of such property and such special assessments as may be levied from time to time as provided for under chapter twenty-two, Fifth Division of Compiled Statutes of Montana, and the amendments thereto.' "

This law was in force when Ordinance No. 17 was passed, approved, and accepted. We are of the opinion that this law became a part of the contract embodied in said ordinance, and that relator had a right to insist that, in so far as might be necessary to pay what was due it for hydrant rentals in accordance with rates prescribed in the ordinance contract, a special tax, as provided for in that act, should be levied annually; of course, in only such sums as would be needed, and not exceeding the five mill limit. The contract was entered into in contemplation of a special fund being created by the city to meet liabilities incurred thereunder; and the legislature, in said act, contemplated at the time that cities of the territory should pay for water used by them for sewerage and fire purposes from taxes levied and collected for that specific purpose. The case of *Davenport v. Kleinschmidt*, supra, does not disapprove the Iowa cases holding that, because a general law provided for payment from a special fund, a liability incurred by a city to supply its inhabitants with water was not a debt, in the sense of the term as employed in the constitution of Iowa, forbidding cities to incur debts in excess of a certain proportion to their assessable property. It was under different conditions of law and fact that the supreme court of the territory of Montana held in *Davenport v. Kleinschmidt* that the liability incurred by the city of Helena under its ordinance contract was a debt. This appears from a careful reading of the case.

Respondents urge: "The provisions of section 27, con-

taining the agreement of the city to pay the hydrant rentals to the bondholders, and requiring a certificate of such agreement on the back of each of the bonds, is an attempt to loan to the company the credit of the city, in violation of Act Congress 1886, § 2 (Comp. St. Mont., at page 32)." This section referred to is as follows: "That no territory of the United States now or hereafter to be organized, or any political or municipal corporation or subdivision of any such territory, shall hereafter make any subscription to the capital stock of any incorporated company, or company or association having corporate powers, or in any manner loan its credit to or use it for the benefit of any such company or association or borrow any money for the use of any such company or association."

We hold that the act of congress was not violated by section 27 of the ordinance, and the action of the city thereunder as to its certificate on the bonds.

It follows, in this view of the case, that neither under the organic act of the territory of Montana, nor the constitution of the state of Montana, is or was the liability incurred by the city of Great Falls under Ordinance 17 a debt in the sense prohibited. After rights had vested under the act of the legislative assembly passed in 1889, *supra*, neither the legislature nor the people of Montana, by adopting a constitution, could have impaired the contract obligation attaching. The constitution of the United States forbids this. See *Wolf v. New Orleans*, 103 U. S. 358, and *Von Hoffman v. City of Quincy*, 4 Wall. 535.

Does the alternative writ contain allegations showing a cause of action which would entitle relator to a writ of mandamus? Yes.

Did relator have any plain, speedy, and adequate remedy in the ordinary course of law? It did not. Mandamus was clearly the remedy. Mandamus, even in the common-law view of it, long ago ceased to be a prerogative writ, and became gradually, both in the English and American courts, to be regarded and interpreted as a writ of right. Since the breaking down by the codes of so many of the formal bar-

riers between equity and law, the remedy by mandamus, however different its legal history from the writ of injunction, is none the less elastic and adaptable within its proper sphere, as the latter is within its sphere. The function of each is by summary legal intervention to prevent wrongdoing. The one sets the law in motion to compel the doing of what should be done; the other prevents or checks threatened or actual wrongdoing. Each serves the ends of justice practically. Each is a developed remedy, adapted to the modern needs and ideas; and, when the proper occasion demands either, the writ should be issued readily, without regard to any mere lifeless distinctions of past history.

Sections 1961 and 1962 (relating to mandamus), Code Civil Procedure Montana, 1895, are as follows:

"Sec. 1961. It may be issued by the supreme court or the district court, or any judge of the district court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person.

"Sec. 1962. The writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It must be issued upon affidavit, on the application of the party beneficially interested."

Under said section 1961, the issuance of the writ does not depend upon the exercise of a mere discretion on the part of the court or judge, regardless of the question of whether there exists a plain, speedy, and adequate remedy in the ordinary course of law. The discretion should be exercised in connection with the answer to that question. But, under section 1962, if there is not a plain, speedy, and adequate remedy in the ordinary course of law, then there is no discretion. The court or judge must issue the writ.

Had the city of Great Falls anything before it to be de-

terminated or decided when relator's claim for hydrant rentals was acted upon, on October 5 and November 2, 1896? No.

The question of the number of hydrants had been decided months previously, and payment had been made for 251 hydrants up to May 1, 1896. The answer itself concedes that the mains to an extent requiring 251 hydrants had been laid under the direction of the city government. The city's own records establish the fact, and the trial court found, that 251 hydrants had been placed and accepted along these mains. The evidence offered to prove that three of these hydrants were outside of the city limits, and that six others were in an addition to the city, and maintained under a special agreement, and that 13 others were below the surface of the ground, and therefore inaccessible for fire and sewerage purposes, was all properly excluded. There was no averment in the answer laying any foundation for evidence to contradict the city's own records kept presumably in accordance with the law requiring them to be kept.

If the city is dissatisfied by reason of defects in any hydrants, it certainly, under the terms of its contract, can remedy the same. So far as the three hydrants outside of the city limits are concerned, they may be so near the city limits as to be necessary at those points for the protection of the city.

The evidence offered to show that relator had no city or county license was also properly excluded on the trial. There was no allegation in the answer to support its admission, and it was improperly sought to be elicited on cross-examination.

The offer to show that impure and unwholesome water had been furnished the inhabitants of the city was wholly immaterial. The point from which the water was to be taken by the relator had been expressly agreed upon in the ordinance, and there was no issue as to the quality of the water furnished.

The objection that there was a defect of parties, averred in the answer, and sought to be maintained on the trial, came too late. No advantage was taken of any defect by demurrer, as the Code of Civil Procedure provides it shall be taken. To

prevent any possible injustice to the city in this respect, however, proper provision can be made in the writ which we shall direct to be issued. Relator was clearly beneficially interested in the enforcement of the ordinance.

The objection that the alternative writ fails to contain any allegation in compliance with section 4808 Political Code Montana, requiring an affidavit reciting certain facts as to the interests of the parties in the claim presented, is without merit.

The conclusion is unavoidable that the sole and only reason prompting the city council to reject the claim of relator on October 5 and November 2, 1896, was to repudiate the contract; and the other possible reasons suggested to uphold its action are without merit. We cite *Wood v. Strother*, 76 Cal. 545, 18 Pac. 766, in this connection; also *People v. Supervisors of Otsego Co.*, 51 N. Y. 401.

As to the question of whether or not the city was properly commanded to levy sufficient taxes for the year ending May 1, 1898, our view is as follows: The city had announced that it repudiated the water contract, but still clung to the use of the water furnished by the relator's plant. Under these circumstances, the command was a proper one. It is clear to us that relator, under all these conditions we have set forth, had no plain, had no speedy, and had no adequate, remedy in the ordinary course of law. The judge who granted the new trial should not have done so, and the same must be set aside.

The cause is remanded, with directions to the lower court to grant a peremptory writ of mandamus as prayed, but to direct therein that any warrant drawn on the water fund of the city be delivered into court, to be held there, and not turned over to relator, until the written consent of the Illinois Trust & Savings Bank has been obtained.

PEMBERTON, C. J., and HUNT, J., concur.

O'ROURKE, RESPONDENT, v. BUTTE LODGE NO. 14,
INDEPENDENT ORDER OF GOOD TEMPLARS
ET AL., APPELLANTS.

[Submitted May 13, 1897. Decided May 24, 1897.]

Mechanic's Lien—Sub-contractor—Suit in Equity.

MECHANIC'S LIEN—Sub-contractor.—A sub-contractor is entitled to a judgment for a lien against the building for materials furnished by him, although summons was served by publication against the principal contractor, against whom no personal judgment could be obtained.

SUIT IN EQUITY—Verdict.—In a suit in equity, the court can set aside the verdict or findings of the jury, and adopt findings of its own.

Appeal from the district court, Silver Bow county. William O. Speer, Judge.

Statement of the case by the justice delivering the opinion.

ACTION by Thomas O'Rourke, executor of D. L. Harris, deceased, against Butte Lodge, No. 14, Independent Order of Good Templars, and others. Judgment for plaintiff. Defendants appeal. Affirmed.

After the commencement of this suit, Harris died, and O'Rourke, the plaintiff in this case, became his executor.

It appears from the record that in July, 1891, defendants Joyner Brothers, a corporation or firm, entered into a contract with the defendant Butte Lodge No. 14, I. O. G. T., to erect a three-story brick building on a town lot in Butte city, for said lodge. Thereafter the Joyner Brothers sublet the contract for furnishing the brick to be used in the construction of the building to one Ed. King, who was to furnish them at the rate of eight dollars per thousand. King was one of the sureties on the bond of the Joyner Brothers for the performance of the building contract entered into between the Joyner Brothers and the lodge, to the effect that the Joyner Brothers would complete the building according to the plans and specifications, and deliver the same to the lodge free of

liens. The bond provided that King should not be paid for the brick until all bills that might become liens upon the building were paid.

It further appears from the record that, about August 11th of the same year, King gave a chattel mortgage to D. L. Harris on the entire stock of brick in his brickyard, being the brickyard from which King was furnishing the brick to go into the construction of the building in question. Thereupon Harris notified H. M. Patterson, who was the architect and agent of the defendant lodge for the construction of said building, and who, as such agent, was paying the bills as they became due, that all moneys owing for brick were to be paid to him (Harris). Patterson made no objection to this, but immediately informed the Joyner Brothers.

It appears that the Joyner Brothers, then believing that they could obtain brick cheaper than King had been theretofore furnishing them, made no objection, as they concluded that they could get rid of the King contract, and buy brick cheaper than King had been furnishing them. This occurred soon after King began to deliver the brick under his contract with the Joyner Brothers. Harris discovered that the King brick were not being received for the construction of the building, and thereupon sought a conference with the Joyner Brothers and Patterson. At this conference, he agreed to make King's contract and bond good, and see that the brick furnished under the King contract should be good. Harris thereupon took possession of the King brickyard, paid off King's hands, and commenced the full management and control of the brickyard himself, which continued until all the brick were delivered which were necessary for the construction of the building. He placed his own foreman in charge, and thereafter all the brick which went into the construction of the building were delivered by Harris, and received by Patterson, the agent and architect of the building, knowing that they were being delivered by Harris, instead of King. It seems further that after Harris took possession of the yard, and commenced to deliver the brick under the King contract,

Patterson, the agent for the defendant lodge, would pay no bills or orders on account thereof, without Harris' signature. The evidence shows that Patterson relied upon Harris, and not upon King, to deliver the brick under the King contract.

About the 16th of September, 1891, a suit was commenced in the district court of Silver Bow county by A. A. McMillan and others, against Ed. King, by attachment; and the Joyner Brothers and the defendant lodge were garnished, and whatever amounts or debts were due and owing from them to King were attached. The case was tried to a jury. The jury made certain findings of fact, and found a general verdict in favor of the defendant lodge. Thereafter the court overruled a motion of said defendant for judgment in accordance with the findings and verdict, and rendered judgment in favor of plaintiff, notwithstanding the verdict; the court having set aside the special findings of fact of the jury, and made special findings of its own. Thereafter the defendant lodge filed its motion for a new trial, which was overruled. An appeal is prosecuted from the judgment and order refusing a new trial.

C. R. Leonard and F. T. McBride, for Appellant.

Forbis & Forbis and E. B. Howell, for Respondents.

PEMBERTON, C. J.—We think the evidence in this case was ample to show that Harris was substituted, with the consent of all the parties in interest, for King in the contract by which King was to furnish the brick to construct the building in question by the Joyner Brothers. It is not necessary to treat the evidence upon this issue in detail.

It is not disputed that the defendant lodge still owes the sum of \$823.60 for brick used in the construction of the building mentioned in the pleadings. A stipulation in the record concedes this. The chief contention seems to be as to who is entitled to this money—the plaintiff, whose testator furnished the brick, or A. A. McMillan et al., the attaching creditors of King.

The principal error assigned and contended for on this

appeal is that the defendants Joyner Brothers were not personally served with summons in the case. They were served by publication of summons. Appellant lodge contends that, as they were necessary parties to the suit, the plaintiff could have no judgment against it, the defendant lodge, foreclosing his lien until a valid judgment was first had against them for the amount found to be due from them for the brick.

We think this is a mistaken view of the law. There is but one cause of action stated in the complaint. This is the indebtedness due from the Joyner Brothers to Harris for the brick used in the construction of the building. But there are two remedies given by law: One a personal judgment against the Joyner Brothers for the amount of such indebtedness; the other a proceeding *in rem* under the statute, equitable in its character, against the building in the construction of which the brick were used. The plaintiff has the right under the law to pursue and invoke both these remedies in one suit. This is in accordance with the views of this court, as announced in *American Saving and Loan Association v. Burghardt*, recently decided, and reported in 48 Pac. 391. To hold that because plaintiff is unable to procure personal service upon the Joyner Brothers, who were the original contractors in this case, and for that reason is unable to recover a valid personal judgment against them, he is thereby deprived of his statutory remedy *in rem* against the building, we think so unjust and inequitable as to find no support in authority or reason. Certainly, our codes do not warrant such a construction, in our opinion. If such be the law, then all the owner of a building has to do is to get the contractor out of the state, so that he cannot be personally served with summons, to defeat the claims of all laborers and material men under the mechanic's lien laws of the state.

This proceeding to foreclose the lien against the building being equitable in its character, the court had authority to set aside the findings of the jury, and render judgment for the plaintiff, notwithstanding the verdict, if the findings and verdict were not authorized by the evidence. In this case the

court was fully justified in its action. We think there is but little merit in this appeal. The judgment and order appealed from are affirmed.

Affirmed.

HUNT and BUCK, JJ., concur.

JENNINGS, ADMINISTRATOR, APPELLANT, v. GORMAN,
RESPONDENT.

[Submitted May 17, 1897. Decided May 24, 1897.]

*Ejectment—Adverse Possession—Burden of Proof—Evidence
in Rebuttal.*

ADVERSE POSSESSION—*Burden of Proof.*—In an action of ejectment, the burden is upon the defendant to establish his claim of adverse possession.

SAME—*Evidence in Rebuttal.*—In such an action, where defendant has introduced evidence tending to show his adverse possession, plaintiff is entitled to introduce evidence in rebuttal tending to show the contrary.

Appeal from District Court, Silver Bow County. J. J. McHatton, Judge.

ACTION by Ellen Jennings, administratrix of the estate of Solomon Jennings, deceased, against Robert Gorman, for ejectment. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Statement of the case by the justice delivering the opinion.

Plaintiff brought ejectment to recover possession of a certain tract of ground in Silver Bow county, and alleged an ouster of her intestate by defendant on July 1, 1889.

Defendant denied ownership of Solomon Jennings, decedent, at any time after July 23, 1888, denied all other allegations of the complaint, and affirmatively pleaded that neither plaintiff nor her intestate had been seised or possessed of the premises described in the complaint within five years before this action was brought, which was June 6, 1894. Defendant al-

leged that on and since July 23, 1888, defendant had been exclusive and adverse possession, and that, if Solomon Jennings ever had a cause of action against defendant, it was barred by the statute of limitations. For an equitable defense defendant pleaded purchase by him on July 23, 1888, of premises in controversy, but that description thereof was advertently and by mistake omitted from a deed dated July 23, 1888, from Solomon Jennings and wife to defendant. Defendant prayed for reformation of the deed.

The replication denied all new matter alleged. The material issues as to mistake and reformation of the deed were tried to the court, which found for the plaintiff.

Thereupon the issues of adverse possession and the statute of limitations were tried before a jury. The verdict was for defendant. Judgment was afterwards entered in defendant's favor, declaring him to be the owner and entitled to the possession of the land.

Plaintiff moved for a new trial, but the court denied the motion. Plaintiff appeals.

L. J. Hamilton and Chas. O'Donnell, for Appellant.

Stapleton & Stapleton and W. S. Shaw, for Respondent.

HUNT, J.—The defendant was obliged to prove his defense of adverse possession by a preponderance of evidence. He therefore assumed, as an essential element of his alleged adverse holding, the burden of proving a continuity of possession which ripened into a title. If there was an interruption of his holding, the term of his adverse possession closed. These rules are elementary, and were certainly applicable to the case at bar. Accordingly the defendant was allowed, although against plaintiff's objection, to offer his evidence tending to prove his continuous and exclusive occupation of the premises in controversy for the period of five years next preceding the commencement of this action.

This evidence was to the effect that for the several years 1889, 1890, 1891, 1892 and 1893, defendant had himself cul-

tivated the ground, in hay crops, or that the land had been so cultivated by tenants of his, and that Robert Gorman, defendant, had control of the premises during that time.

But when the plaintiff offered rebuttal testimony to contradict the defendant's witnesses upon the material matters just suggested, and tried to introduce evidence to show that defendant did not have exclusive possession of the premises, and did not exercise exclusive control over them during the whole period of five years immediately preceding the institution of this action, but that plaintiff's intestate was in possession, the defendant objected, and the court sustained the objection.

This was prejudicial error, and requires a reversal of the case. Manifestly, if evidence to support the defense of adverse possession was permitted at all, testimony to rebut such evidence was competent.

The case seems to have become complicated in the course of its proceeding. The equitable defense of a purchase of the ground in controversy by defendant, and that there was a mistake in the deed delivered to him, was tried to the court, and decided against defendant. This was an adjudication of the fact that legal title was in Jennings at the time of defendant's entry.

But upon exactly what ground the learned judge, who tried the case, based his decision upon the equitable issues, does not appear in the record. We would have been aided by knowing his views upon this branch of the case, for they would have shed light upon the conduct of the subsequent trial, and his rulings upon the legal issues. It would seem as though, when the equitable defense was disposed of, the evidence in support of that defense became immaterial to the issues of adverse possession, unless the case was tried upon the theory that if defendant claimed title to the ground in controversy, which was not included in his deed, yet he by mistake believed it was, he could recover upon adverse possession.

Whether or not this theory was warranted by the evidence, we need not now decide; and whether or not the important questions raised by our suggestion that this was the theory

upon which the court proceeded were passed on, we cannot say, for no reference is had to them in the instructions or rulings of the court. But, as this point may arise upon another trial, we refer to the following decisions, which discuss the law: *Metcalf v. McCutchen*, 60 Miss. 145, and cases cited in briefs of counsel in that report; *Ricker v. Hibbard*, 73 Me. 105; Busw. Lim. § 250; *Walbrunn v. Ballen*, 68 Mo. 164; *Grube v. Wells*, 34 Ia. 148; *Hitchings v. Morrison*, 72 Me. 331; *French v. Pearce*, 8 Conn. 439.

The judgment is reversed, and the cause is remanded for a new trial.

Reversed and Remanded.

PEMBERTON, C. J., and BUCK, J., concur.

LYNCH, RESPONDENT, v. BECHTEL, APPELLANT.

[Submitted May 11, 1897, Decided May 24, 1897.]

Pleading—Defective Complaint—Waiver by Answer—Answer, Aiding Complaint—Contract, Time—Question of Law.

PLEADING—Waiver by Answer.—Where defendant answers after a demurrer is overruled, he waives any objection to the complaint because of any ambiguity or uncertainty therein.

SAME—Answer—Aiding Complaint.—An answer which assumes that the complaint contains an allegation, supplies the omission.

CONTRACT—Time of Performance—Question of Law.—Plaintiff having contracted for the erection of a building upon his own premises, which adjoined defendant's hotel, agreed to lease to the defendant the two upper stories thereof for the term of five years "from the completion of said three-story building * * * which said building shall be completed on or before September 1, 1893, and upon such completion said term of five years shall begin and date therefrom." Held, that time was not of the essence of the contract.

Appeal from the district court, Silver Bow county. J. J. McHatton, Judge.

ACTION by James H. Lynch against Isaac Bechtel. Judgment for plaintiff. Defendant appeals. Affirmed.

Statement of the case by the justice delivering the opinion.

18	548
21	87
19	548
30	236
30	451

On May, 1893, plaintiff (respondent) had in process of construction under a contract to have it completed by September 1, 1893, a three-story building on a lot in Butte City, adjoining the land on which stood the Clarence Hotel.

Defendant (appellant), the landlord of the Clarence Hotel, with a view to acquiring additional hotel rooms, entered into a written agreement with plaintiff, under the terms of which he (defendant) was to lease the second and third stories of plaintiff's building at a monthly rental of \$150, for a period of five years.

This lease agreement provided, as to the two upper stories aforesaid, that defendant was "to have and to hold for the term of five years from the completion of said three-story and basement brick store building, which said building shall be completed on or before the first day of September, 1893, and upon such completion said term of five years shall begin and date therefrom." It also contained a provision that plaintiff, before the completion of said building, should do certain acts in reference to setting up radiators (to be furnished by defendant), and connecting heating pipes attached thereto with defendant's furnace in the Clarence Hotel. The other provisions of the lease it is unnecessary to set forth.

The plaintiff (apparently from unavoidable causes) did not complete his entire building until some time in November, 1893. As the evidence shows, however, the second and third stories were finished and ready for occupancy at no little extra expense to plaintiff on September 1, 1893. The radiators were not set up, and the heating pipes had not been connected with the furnace of the Clarence Hotel, on said date; but there was evidence to establish the fact that defendant had waived this failure, and that it was due to him that these requirements had not been complied with. On said date (September 1, 1893), plaintiff tendered to defendant the keys of the two stories, and notified him that the premises were ready for occupation. Defendant refused to accept the keys, or to take possession, and repudiated the contract, assigning, as his reason therefor, that plaintiff had not complied with the lease. No possession of the premises was ever taken by defendant.

On March 10, 1894, the plaintiff instituted a suit against the defendant. The complaint averred the execution of the lease. It alleged that "prior to the 1st day of September, 1893, the second and third stories, so leased by defendant, were fully completed, and in all respects ready for occupancy and use for the purpose for which they were needed by defendant." It averred the refusal of the defendant to permit it, as an excuse for the nonconnection of the heating pipes and the failure to put in the radiators. It alleged the performance of certain other things required of plaintiff under the terms of the lease. The complaint then proceeded: "Plaintiff further states that there is now due, owing, and unpaid to him from defendant, as rent, under said lease, for the months of September, October, November, and December, 1893, and January, February, and March, 1894, after allowing all credits and offsets, the full sum of \$814.35."

A demurrer was interposed on the following grounds:

(1) Ambiguity and uncertainty, in that the complaint failed to show whether the plaintiff sued for rent for the actual occupation of the premises, or for rent for the premises under the terms of the lease without entry or occupation thereof.

(2) That the complaint failed to state a cause of action.

The demurrer was overruled and the defendant filed an answer. He denied that the two stories were completed and ready for occupancy on the 1st day of September, 1893; denied that defendant refused to allow plaintiff to connect the heating pipes; averred that plaintiff had not completed a certain entrance as required by the lease; denied that defendant had ever taken possession of or occupied the premises; denied "that the plaintiff on his part had complied with and performed all the conditions required of him by the terms of said lease to be by him performed on or before the said first day of September, or at all complied with said terms." The answer also denied any indebtedness as alleged or otherwise for rent under the lease.

The case was tried with a jury. Evidence was offered on

certain of the issues raised by the pleadings. In instructing the jury, the court declared that it was no defense to the action that the entire building of plaintiff had not been completed on September 1, 1893. The verdict was against the defendant, and judgment was rendered for plaintiff for the amount of the rent prescribed under the terms of the lease, less rents plaintiff had collected from parties occupying the premises subsequent to September 1, 1893, and prior to the commencement of the suit.

The appeal is from the judgment and the order denying the motion for a new trial.

Thompson Campbell and *J. L. & M. L. Wines*, for Appellant.

C. R. Leonard, *Wm. H. De Witt* and *J. W. Cotter*, for Respondent.

BUCK, J.—The objection raised by defendant's demurrer that the complaint is ambiguous and uncertain cannot avail him on this appeal. By answering after his demurrer was overruled, he waived it.

Does the complaint state a cause of action?

We think it does. However defectively, it nevertheless states a cause of action. Defendant filed his answer, and the case was tried on issues raised. In the answer, the defendant assumed that allegations were in the complaint which it should properly have contained, but did not; in other words, the answer supplied the omission in the complaint. See *Hamilton v. Railway Co.*, 17 Mont. 334, 42 Pac. 860, and 43 Pac. 713.

Did the court err in instructing the jury that the failure on the part of plaintiff to complete the entire building by September 1, 1893, was no defense to the action?

Some evidence was offered in behalf of defendant to show that by reason of the noise that would result in connection with the completion of the lower part of the building after September 1, 1893, guests or lodgers who might be occupying rooms in the

upper stories would be disturbed, and that the building material piled on the sidewalk in front of the building would be a source of discomfort. But this was merely cumulative evidence to establish incidentally the main defense relied upon, and was not offered for the purpose of proving any counter damages. The record shows that prior to September 1, 1893, plaintiff had offered defendant several hundred dollars for an extension of time within which he should be allowed to finish the building, according to defendant, or the two upper stories, according to plaintiff. Defendant did not accept this offer. Manifestly, defendant knew at the time of this offer that the entire building could not be finished on September 1st. The explanation defendant gives for his refusal to accept this offer was that it was plaintiff's duty, and not his, to comply with the terms of the contract as to the completion of the building on or before September 1st. As a result of defendant's not accepting this offer, plaintiff, at an extra expense of several hundred dollars, finished the second and third stories of the building on or prior to September 1st. It clearly appears from the evidence that the only ground for defendant's refusal to take possession of the premises on September 1, 1893, was his belief that he had a right to repudiate the entire five years' lease if plaintiff did not have the entire building completed on September 1st. Can such a literal construction be given to this agreement under the established facts of this case? Some two months after September 1st, the entire building was completed. From the situation of the parties at the time of the lease, the purpose for which it was entered into, and all the incidental facts before it explanatory of the entire transaction, we think the lower court committed no error in instructing the jury that the failure to complete the entire building on September 1, 1893, was no defense to plaintiff's action.

There was no mixed question of law and fact. It was one of law alone, under the facts and the pleadings. Time was not expressly made the essence of the contract by its terms. The defendant did not expressly plead, and did not attempt

to show by evidence, that it was ever intended that the date September 1, 1893, was of the essence of the contract. The general rule of law, as stated by Mr. Clark in his work on Contracts (Hornbook Ed.), in the latter part of section 251, is as follows:

“In contracts for the sale of land, or for the performance of services, or the construction of buildings, time will be held of the essence if, from the nature of the property and the circumstances, it seems that the parties must have so intended, but generally, in such contracts, time is not of the essence.”

The question whether or not time was the essence of this contract, under the facts of this case, was for the court to determine, and not the jury. But the use of the word “building” in the *habendum* clause of the lease, was rather by way of description than otherwise. When the two upper stories were finished and ready for occupancy, the contract was substantially performed.

We are of the opinion that the lower court committed no error in this respect. If defendant had been damaged by plaintiff's delay in completing the entire building, he could have pleaded wherein he was damaged. But he did not do so.

From the pleadings and from the evidence, it clearly appears that defendant relied absolutely upon his right to reject and repudiate the contract, simply because the entire building had not been completed on September 1, 1893. This, as we have shown, he had no right to do.

The order denying the motion for a new trial and the judgment are both affirmed.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

WATTERSON, RESPONDENT, v. E. L. BONNER CO. ET
AL., APPELLANTS.

[Submitted May 19, 1897. Decided May 24, 1897.]

Public Lands—Statutory Homestead—Fixtures—Mortgage.

PUBLIC LANDS—Statutory Homestead.—A homestead (under the state statute) can be had in lands belonging to the United States; the nature of the claimant's title is not a matter that concerns a creditor.

SAME—Fixtures.—All the improvements upon the land, including fences, belong to the homestead and cannot be taken by a creditor.

SAME—Mortgage.—A mortgage of a homestead, which is not signed by the wife, is void.

Appeal from District Court, Deer Lodge County. Theo. Brantley, Judge.

AN ACTION by Sarah M. Watterson against the E. L. Bonner Company, a corporation, and John W. Nelson, sheriff of Deer Lodge county. Judgment for plaintiff; and defendants appeal. Affirmed.

Statement of the case by the justice delivering the opinion.

It appears from the record in this case that the plaintiff is the wife of one James A. Watterson, and that in the month of March, 1890, the plaintiff, with her said husband and minor children, located on the land described in the complaint, which was at that time surveyed public land. The plaintiff, with her said husband and children, continued to live on the land until about the last of October, 1894, when the said James A. Watterson deserted and abandoned his wife and family, and since that time has continued to live separate and apart from them, doing nothing to provide for or maintain them. While the plaintiff and her husband resided upon said land, they erected thereon a log cabin, some outhouses, and fenced in a portion of said land. These improvements were placed upon the land before Watterson deserted his wife and family. On the 26th day of April, 1894, the said Watterson

executed to the defendant E. L. Bonner & Co. a chattel mortgage on the buildings, improvements, and fences on said land, for the purpose of securing a debt due from said Watterson to the defendant Bonner & Co. The plaintiff in this suit did not join in the execution or sign said mortgage.

About the time of the commencement of this action, the plaintiff in this suit filed on the land mentioned in the complaint as a homestead. This suit is brought by the plaintiff to enjoin the defendants from foreclosing said chattel mortgage, in accordance with the terms thereof, the plaintiff claiming the land and improvements as a homestead.

The defendants demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. This demurrer was overruled. Thereupon the defendants filed their answer.

The case was tried by the court, without a jury. The findings and judgment of the court were in favor of the plaintiff. Defendants made a motion for a new trial, which was overruled.

The appeal is from the judgment and the order overruling the motion for a new trial.

Ed. Scharnikow, for Appellants.

James M. Self, for Respondent.

PEMBERTON, C. J.—The first question to be determined is as to whether a person may claim a homestead which is situated on public land of the United States.

This question has been decided by the supreme court of the state of California in a number of cases. In *Spencer v. Geissman*, 37 Cal. 96, Chief Justice Sawyer, speaking for the court, says:

“The statute does not specify the kind of title a party shall have in order to enable him to secure a homestead. It says nothing about title. The homestead right given by the statute is impressed on the land to the extent of the interest of the claimant in it, not on the title merely. The actual

homestead, as against everybody who has not a better title, becomes impressed with the legal homestead right, by taking the proceedings prescribed by the statute. The estate or interest of the occupant, be it more or less, thereby becomes exempt from forced sales on execution, and can only be affected by voluntary conveyances or relinquishment in the mode prescribed."

In *Gaylord v. Place*, 98 Cal. 472, 33 Pac. 484, it is held that "mineral land of the United States located and chiefly used by the owners as a placer mining claim, but also used as a place of residence for himself and family, and to some extent for pasturing stock and raising vegetables, is subject to selection as a homestead. A homestead right does not depend upon the character of the title held or which may be acquired by the party claiming it; but it is impressed on the land to the extent of the interest of the claimant in it, who has actual and rightful possession of the premises at the time of selection, and not on the title merely, which, as between the claimant and his creditors, is a false quantity, to be excluded from consideration." *Brooks v. Hyde*, 37 Cal. 366.

We are of the opinion that the question of the claimant's title to the land upon which a homestead exemption is claimed is immaterial. Whether the title to the land be good or bad is not a matter that concerns the creditor.

In this case the appellant concedes that the plaintiff is entitled to the house in which she and her children live under her claim of homestead, but insists that the homestead claim should not extend to the outhouses, fences, and other improvements included in the chattel mortgage executed by J. A. Watterson.

This question is discussed at length in *Greeley v. Scott*, 2 Woods, 657, Fed. Cas. No. 5,746, and in *Conklin v. Foster*, 57 Ill. 104. According to these authorities, the outbuildings, fences, and other improvements constitute part of the homestead, and cannot be sold under legal process, unless, taken all together, they exceed the amount exempted to the homesteader.

It would be a strange kind of benefit to confer upon a farmer a house to live in free from sale under legal process, and refuse him a fence to protect his crops grown upon his homestead. See *Englebrecht v. Shade*, 47 Cal. 627, and *Arendt v. Mace*, 76 Cal. 315, 18 Pac. 376.

The authorities are so numerous to the effect that the abandoned wife may claim the homestead exemption that we do not think it necessary to discuss the question here. See *Frazier v. Syas* (Neb.) 4 N. W. 934, 35 Am. Rep. 466; *Collier v. Lattimer*, 35 Am. Rep. 711; and *Kenley v. Hudelson*, 39 Am. Rep. 31.

We are of the opinion that the premises described in the pleadings constituted the homestead of the plaintiff at the beginning of this suit, and prior thereto.

It appearing, therefore, that she did not sign or otherwise join her husband in the execution of the chattel mortgage conveying the same to the defendant the E. L. Bonner Company, the mortgage was for that reason absolutely void, as was held by this court in *American L. & S. Association v. Burghardt*, recently decided, and reported in 48 Pac. 391.

We think the foregoing treatment determines all the material questions presented by this appeal. The judgment and order appealed from are affirmed.

Affirmed.

HUNT and BUCK, J. J., concur.

RUMNEY LAND AND CATTLE COMPANY, RESPONDENT, v. DETROIT AND MONTANA CATTLE COMPANY, APPELLANT.

Decided March 24, 1897.

Appeal from an Order—Presumption—Practice—Record.

APPEAL FROM AN ORDER—*Presumption*.—On an appeal from an order, the presumption is that the order was properly granted, unless the contrary appears from the record.

19	557
25	873
19	557
133	156
19	557
e27	97
27	98
19	557
e28	581
19	557
30	441
19	557
35	74
19	557
34	341
34	616

SAME—Record on Appeal.—On an appeal from an order, except when the code otherwise provides, the order, and the paper and evidence upon which the order was granted, should be incorporated in a bill of exceptions, for the purpose of identifying the same.

Appeal from district court, Cascade county. C. H. Benton, Judge.

ACTION by the Rumney Land & Cattle Company against the Detroit & Montana Cattle Company, in which there was a judgment by default in favor of plaintiff. From an order denying a motion to set aside the default and judgment, defendant appealed. Plaintiff moves to strike from the transcript defendant's answer, and certain affidavits filed before the hearing of said motion. Motion granted.

Statement of the case by the justice delivering the opinion.

The transcript on appeal contains the following papers: (1) A complaint filed April 14, 1896; (2) a summons showing personal service on April 17, 1896; (3) the entry of a default by reason of defendant's failure to answer within the time prescribed by law—on June 2, 1896; (4) a decree signed August 19, 1896; (5) notice of motion and a motion to set aside the default and judgment on the ground of a mistake and excusable neglect, filed on October 2, 1896; (6) an answer marked "Filed on Oct. 2d, 1896;" (7) certain affidavits filed prior to the hearing of the motion; (8) order denying motion, dated November 9, 1896; (9) notice of appeals, etc.

The certificate of the clerk of the district court in the transcript is as follows:

"I hereby certify that the foregoing is a full, true, and correct copy of the proceedings had in the case in which the Rumney Land and Cattle Company is plaintiff and the Montana Cattle Company is defendant [enumerating the papers mentioned], and that this certificate is made after comparing the foregoing transcript with the original documents on file in my office."

The appeal is from the order denying the motion to set aside the default and judgment.

Toole & Wallace, for Appellant.

Clayberg, Corbett & Gunn, for Respondent.

BUCK, J.—Respondent moves to strike from the transcript the answer of appellant and the affidavits. The ground for the motion is that there is no identification of these papers for the purpose of showing that they were used on the motion to set aside the default and judgment.

On appeal every presumption in favor of its correctness attaches to a decision or order of the district court. Hence it is incumbent on the appellant to show wherein any error has been committed by the lower court. The transcript must show the error directly, not by way of inference or presumption. If it is necessary to consider the evidence on which an order is based, to determine whether or not error has been committed, that evidence, properly authenticated and properly identified as having been used or as having been before the court at the time it made its order, must be in the record, or a motion to dismiss the appeal so far as any such evidence is concerned must be granted. On the same principle, a motion to strike from a transcript unauthenticated or unidentified matter must also prevail.

The certificate of the clerk, so far as it authenticates the affidavits asked to be stricken out as true copies of the originals on file in the lower court, is sufficient, under section 1739, Code Civil Procedure, 1895. The answer of appellant, possibly tendered in the lower court when the motion to set aside the default was made, could not even have been a record of the lower court, for the date of the filing marked on it is subsequent to the date of the final judgment or decree. If it was tendered on the theory that it should be filed in the event of the default being set aside, clearly the clerk had no authority to mark it "Filed" at the date of such tender. He might properly have marked it "Filed for the purposes of the motion to set aside the default," but he should not have marked it filed as a record in the action.

It has been decided in this court in a recent case (*State v. Millis*, 48 Pac. 773) that under section 1739, *supra*, a clerk cannot certify evidence, oral or written, as having been before the court, or as having been the only evidence before it, on the hearing of a motion for an order after final judgment. This is the law under the Code of Civil Procedure of 1895. If the case of *Bookwalter v. Conrad*, 14 Mont. 61, 35 Pac. 226, and the previous Montana cases cited therein as authority, conflict with this rule, they must give way to it. These last-mentioned decisions were prior to the adoption of the Codes of 1895; and although section 438, Code Civil Procedure, 1887, under which they were determined, is substantially the same as sections 1737, 1739, Code Civil Procedure, 1895, nevertheless we do not think that a proper distinction was drawn between the clerk's certificate, as simply authenticating papers in a transcript as true copies of the originals on file, and the proper method of identifying them as evidence used on the hearing before the court. Many of the earlier Montana decisions adhered to this distinction, and many decisions of the supreme court of California could be cited to show it.

This brings us face to face with the question, what is the proper method, on appeal from an order—when the respective attorneys have not certified to a transcript, or the statutes have not provided another mode—of identifying the evidence, oral or written, before the lower court on the hearing of the motion for the order?

This court intimated in *State v. Millis* that it was inclined to follow the view of the law entertained by Justice Works (with whom concurred Justices Fox and McFarland) in the case of *Somers v. Somers*, 81 Cal. 608, 22 Pac. 967. After careful consideration, we now adopt that view.

Under the Code of Civil Procedure of 1895, on appeal from an order the only proper mode of bringing up for consideration the evidence relied on, whether oral or written, used or before the court on the hearing of the motion of the order, is by a bill of exceptions; and unless such evidence has

been included in, and made a part of, the record by bill of exceptions taken in pursuance of, and prescribed in, said Code, it is not, and cannot be, considered as properly identified on appeal. Of course, the general rule does not govern cases where the code authorizes another mode, as, for example, an order on a motion for a new trial.

The supreme court of California, under statutes similar to the present statutes of Montana, had for some time held that the judge of the lower court could by his certificate identify the evidence used or before him on the hearing of the motion. In *Arnold v. Sinclair*, 12 Mont. 248, 29 Pac. 1124, cited in *Bookwalter v. Conrad*, *supra*, the court apparently approved of such a practice. But Justice Works, in *Somers v. Somers*, *supra*, clearly shows that the only mode provided in the codes of California (whose provisions on the subject are substantially the same as those of Montana) for such identifications is by a formal bill of exceptions. We quote this applicable language from Justice Words' opinion, on page 613, 81 Cal., and page 968, 22 Pac.:

"It is well said that counsel and their clients should be protected where they have followed the practice approved by this court, and we acknowledge the force of the suggestion. Strangely enough, courts of justice are expected to perpetuate their errors, instead of correcting them. There is a legitimate reason for this in some cases; for example, where property rights have grown up under a decision which is subsequently ascertained to have been erroneous. But such a doctrine has no application to decisions affecting mere questions of practice. If the matter were one which could be controlled by rules of law, and was not governed by positive law, we should be in favor of adopting a rule that hereafter all cases must be presented by bill of exceptions, but that cases now pending should not be affected thereby. But, as we do not believe that this court has any authority to regulate the mode of presenting papers on appeal where one is provided for by statute, we feel constrained to dismiss the appeal on the ground that the papers could only be presented to this court by bill of exceptions."

We believe it is well to settle this question of practice as soon as possible in this state under its new code, and that, in laying down the rule as we have stated it, many otherwise possible snarls in practice will hereafter be avoided.

The motion to strike from the record the answer and affidavits asked to be stricken from it, is granted.

PEMBERTON, C. J., and HUNT, J., concur.

COLLIER, APPELLANT, v. FITZPATRICK, SHERIFF, RESPONDENT.

[Submitted May 12, 1897. Decided May 24 1897.]

Replevin—Fraudulent Conveyance—Instruction.

In an action of replevin, defendant sheriff justified under a writ, and claimed that the property sued for had been transferred to plaintiff by her husband, the defendant named in the writ, in fraud of his creditors. Evidence was introduced showing that some of the property was transferred to the plaintiff by her husband; and that she had bought the rest from other persons. *Held*, it was error for the court in instructing the jury to assume the fact that plaintiff acquired title to all of the property through her husband.

Appeal from district court, Deer Lodge county. Theodore Brantley, Judge.

Replevin by Anna Collier against John Fitzpatrick, sheriff of Deer Lodge county. Judgment for defendant, and plaintiff appeals. Modified.

Statement of the case by the court.

Replevin for the return of certain personal property, including, among other chattels, one black horse branded T on left shoulder, one brown mare branded F C on right hip, and one black horse branded P on left shoulder, or for the value of said property and damages. Defendant denied value as alleged, or that plaintiff was the owner or entitled to possession, and pleaded a justification by virtue of a writ of attachment

19	569
22	554
19	562
28	506
19	562
31	335
32	594

and execution placed in his hands as sheriff in a suit against Frank Collier, plaintiff's husband. Trial to jury. Verdict for defendant. Plaintiff's motion for a new trial was overruled. She appeals.

Sawyer & Walsh and A. J. Craven, for Appellant.

PER CURIAM.—The ownership of the property sued for was the principal question tried in this case. Appellant contends that the evidence was insufficient to justify the verdict.

Without recapitulating it, we think it was sufficient, in so far as it affected all property described in the complaint except the black horse branded P and the brown mare. These latter animals plaintiff swore she had traded for with one Jesse Miller, exchanging certain cattle which belonged to her for them. Her testimony in this respect was substantially corroborated by several other witnesses, including Miller, the vendor, and was only disputed by defendant's testimony of the use of horses by plaintiff's husband in the fulfillment of a contract he had, and by plaintiff's neglect to assert ownership of the animals.

The issue of the ownership of these horses was based upon evidence quite different from that pertaining to the rest of the property, which the jury found was transferred to the plaintiff by the husband and plaintiff's sister in bad faith.

Without holding that the evidence clearly showed that plaintiff owned the two horses traded for with Miller, we are impressed with the belief that, considering the evidence bearing upon this branch of the case, appellant's objections to the instructions are sound, and that the court ought not to have assumed in its instructions throughout the charge, as it did, that plaintiff had obtained title to all the property sued for by purchase from her husband or her sister, who in turn said she had purchased from plaintiff's husband. It by no means followed that, if that portion of the property which plaintiff obtained from her husband and sister was fraudulently claimed by her, the two horses obtained from a third person were not her own, or that she could not recover them or their value.

Inasmuch, therefore, as the court seems to have overlooked the separate evidence upon the ownership of the Miller horses, and to have only directed the jury to inquire concerning the property obtained by plaintiff through the husband, and to have assumed that, if the property so transferred to her was not transferred in good faith, plaintiff must fail altogether, we must remand the case, with directions to grant a new trial upon the issue of the ownership of the horses alleged to have been sold by Miller to plaintiff. In other respects the judgment is affirmed.

19	564
29	479
19	564
28	309
19	564
29	557
19	564
34	409

ADOLPH PINCUS, APPELLANT, v. SAMUEL J. REYNOLDS, SHERIFF, RESPONDENT.

(Submitted May 21, 1897. Decided May 31, 1897.)

Fraudulent Conveyance—Evidence—Cross Examination—Declaration of Conspirator.

FRAUDULENT CONVEYANCE—A judgment, which is obtained upon notes known by the holder thereof to have been made for the purpose of defrauding creditors, is void as to creditors.

SAME—Where a judgment is void as to creditors, and the plaintiff in the action is the purchaser at the execution sale, his title is void as to an attacking creditor.

SAME—Although such creditor extended credit after he knew of the sale, he may attack the same for such a demand when he ascertains that the sale was fraudulent.

EVIDENCE—Cross-Examination—In an action for conversion, where the title of the plaintiff is attacked for fraud, he may be rigidly cross-examined as to the bona fides of his title.

SAME—Hearsay—Where the plaintiff is a party to a conspiracy to defraud creditors, the declarations of his co-conspirator, although made in his absence, are admissible in evidence.

Appeal from District Court, Silver Bow county; J. J. McHatton, Judge.

ACTION by Adolph Pincus against Samuel J. Reynolds for conversion. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

Statement of the case by the justice delivering the opinion.

This is an action to recover the value of certain personal

property, described in the complaint, and which the plaintiff claims to be the owner of, and which he alleges the defendant wrongfully took and converted to his own use.

All of the material allegations of the complaint are denied by the answer, except as to the value of the property, which the defendant concedes is of the value of \$300 only, instead of \$3,500 as alleged in the complaint. The defendant at the time of the taking of the property, was the sheriff of Silver Bow county. He alleges that he took possession of the property under a writ of attachment issued in a suit in the district court of Silver Bow county, in a case wherein P. J. Brophy & Co., were the plaintiffs, and James Dunstan and Sol. Lachman were defendants, and justifies his taking of the property under said writ. The defendant further alleges in his answer that whatever claim or right to the property in question this plaintiff (Pincus) has he acquired under and by virtue of his purchase of the property at a sheriff's sale thereof, which sale was had in Silver Bow county under an execution issued on a judgment rendered in the district court of said county in favor of this plaintiff and against Lachman & Dunstan. The answer alleges that said sheriff's sale, at which this plaintiff purchased the goods in controversy, was illegal and void, for the reason that it was made and intended by said Pincus, the plaintiff in the execution and judgment under which said property was sold, and said Lachman & Dunstan, the defendants in said case, for the purpose of hindering and delaying the creditors of said Lachman & Dunstan, and particularly said Brophy & Co., in the collection of their just debts, and was intended to cover up property, and protect the said Lachman & Dunstan in the possession and use thereof against their said creditors, and that said sale was fraudulent and void as against the said creditors of Lachman & Dunstan for the reason that said sale was not accompanied by any delivery or followed by any change of possession of the property. The answer further alleges that the property so pretended to be sold at said sale, before and after said sale, was and remained in the exclusive possession of said Lachman & Dunstan.

The replication denies the allegations of the new matter contained in the answer, and alleges that Brophy & Co., had actual notice of the sale which the answer alleges to be fraudulent and void.

The case was tried with a jury, and a verdict rendered in favor of defendant, and a judgment in accordance therewith. This appeal is from the judgment and an order overruling plaintiff's motion for a new trial.

O. M. Hall and Geo. Haldorn, for Appellant.

F. T. McBride, for Respondent.

PEMBERTON, C. J.—The pivotal question to be determined on this appeal is as to whether the execution sale of the goods in controversy, under and by virtue of which the appellant claims ownership thereof, was illegal, fraudulent, and void for the reasons alleged in the answer.

The execution under which this sale took place was issued on the judgment rendered in the case of Pincus against Lachman & Dunstan, as set out in the statement of the case, and which judgment is attacked for fraud by the answer of respondent. The complaint in the case of Pincus against Lachman & Dunstan, mentioned above, and in which the alleged fraudulent judgment was rendered, alleges as causes for action four promissory notes executed by Lachman & Dunstan—the first for \$1,000, dated December 7, 1891, payable to Pincus; the second, payable to Pincus, in the sum of \$500, dated January 1, 1892; the third for \$1,600, dated October 1, 1891; and the fourth for \$1,250, dated February 1, 1892; the last two notes being payable to one S. D. Martin, who transferred them to Pincus before suit.

The evidence of Martin and Dunstan is positive that there was no consideration for the two Martin notes above mentioned. Concerning the execution of these notes Martin testified as follows:

“I agreed to take these notes to help them (Lachman & Dunstan) out; that is, to ostensibly have them in my debt

when they were not actually in my debt. These notes were given a few days before the time that Pincus brought suit against Lachman & Dunstan. If this \$1,600 note is dated October, 1891, that date is incorrect, for the note was given to me about the time that Pincus brought suit, and, if his complaint was filed February 9, 1892, this note and the other note were given to me within two or three days of that date.

* * * Pincus made the suggestion to me. * * *

Pincus told me he was willing to 'help the boys out,' as he called it. * * * They were not to beat anybody. They just wanted an extension of time, and it was to give them an extension of time that this arrangement was made. They mentioned several creditors, Mr. Brophy in particular. Pincus said he would take these notes, and bring suit, and get judgment, and forestall their other creditors. Prior to the Pincus attachment, Lachman & Dunstan did not owe me a cent. Pincus and Lachman and I had a talk one time about the matter, walking across Main street towards the restaurant; and we had another conversation about it up in the Mint. I saw Lachman at the premises that evening after the sale. He was getting ready, and making calculations of opening up as soon as possible. The arrangement was that Pincus was to let them have the place, and go on and run it as we had agreed to do in the first place."

Dunstan's testimony as to these two notes is as follows:

"That Lachman and he were partners in the restaurant business in 1892; that he knew Mr. Pincus; that at the date of the Martin notes Lachman & Dunstan did not owe Martin a dollar; that Lachman had told him that he would have to sign the Martin and Pincus notes; that the notes were just to confess judgment in favor of Pincus and Martin, so as to give us time, and keep other people from attaching us. On the 9th of February, 1892, we did not owe Sam Martin a dollar."

This testimony is not disproved. While it is not literally admitted by Pincus & Lachman, it is not successfully contradicted, and, we think, is substantially admitted

by them, except that Pincus claims that Lachman & Dunstan did actually owe him \$750, due by three promissory notes, of \$250 each, and some other sums, making in all, as he claims, about \$1,100. But the evidence conclusively shows that this \$750 claim was not sued on by Pincus in the case we are discussing. After the execution sale in question, Pincus went to Lachman & Dunstan with the three \$250 notes and required the execution of a \$750 note in lieu of them; and this \$750 note was placed in bank, and Lachman & Dunstan paid the interest thereon to the bank for a long time after the suit, judgment and sale we are discussing.

From this evidence we do not see how the jury could have done otherwise than find that the judgment in favor of Pincus against Lachman & Dunstan, under which the sale took place at which Pincus bought the property in controversy, was fraudulent and void. It is generally difficult to prove fraud. The party alleging it must generally rely largely upon circumstantial evidence. But in this case we have the positive evidence of two of the conspirators and the substantial admission of the other two. The records of the courts rarely disclose such ample and positive proof of actual fraud as is found in this case. Here we are not compelled to grope through many labyrinths, and ways that are doubtful and dark, to find the slimy trail of the serpent. Here we have a bolder snake, who holds his head up, and disdains to hide or deny.

Counsel for appellant contends that the court erred by permitting Pincus, when on the stand as a witness, to be cross-examined as to the entire transactions between himself and Lachman & Dunstan and Martin, in relation to the giving of the notes sued on and the recovery of the judgment alleged to be fraudulent in defendant's answer. He says the court erroneously permitted the defendant to prove his case by Pincus by an improper cross-examination. But counsel overlooks the fact that Pincus claims in this case to be the owner of the property in controversy. His title is based upon his purchase of the property at an execution sale, which is alleged

to be invalid because had under a judgment obtained by fraud. So that the bona fides of Pincus' title became a material matter, which defendant had a right to inquire into by cross-examination. Pincus, being the party in interest, whose title was alleged to be fraudulent, was properly subjected to a rigid cross-examination for the purpose of ascertaining whether his claim of ownership was bona fide. In such cases the extent to which a cross-examination may go is largely discretionary with the trial court. We see no abuse of a sound judicial discretion here.

During the trial Dunstan was permitted, over appellant's objection, to testify that Lachman, long after the execution sale in controversy, asked him (Dunstan) to go to a lawyer's office to sign a mortgage to Pincus for the same goods purchased by Pincus at the execution sale, and now in controversy. It seems that Lachman had some fear that the execution sale would not stand, and the mortgage was needed to cover possible emergencies. The objection to this evidence is that Pincus was not present. But this was not part of the scheme of fraud. That scheme had not, in the opinion of the conspirators, been successfully carried out and completed. In such cases the declarations of any of the conspirators may be given in evidence, whether made in the presence of all or not. We see no error in this action of the court.

Counsel for appellant says Brophy & Co. cannot attack the sale of the property in question for fraud, because they knew of the sale and gave credit to Lachman & Dunstan after such sale.

Brophy & Co. had judgment against Lachman & Dunstan before this sale. They attached for an indebtedness accruing after the sale. But there is no proof that Brophy & Co. knew that the judgment obtained by Pincus against Lachman & Dunstan was fraudulent. As soon as they learned this, they had a right to attack it, whether their demands accrued before or after the execution sale.

The sale to Pincus of the goods in controversy having been under an execution issued upon a judgment absolutely void on

account of the actual fraud of Pincus and all the parties to such judgment, it becomes unnecessary for us to discuss the question of the necessity of an actual delivery and change of possession of personal property sold at a judicial sale. The judgment obtained by Pincus against Lachman & Dunstan was void. He acquired no title to the property by virtue of the execution sale as against the creditors of Lachman & Dunstan, whether he got actual possession at the sheriff's sale or not.

The judgment and order appealed from are affirmed.

Affirmed.

HUNT and BUCK, JJ., concur.

CASES DETERMINED

IN THE

SUPREME COURT

AT THE

JUNE TERM, 1897.

PRESENT:

HON. WILLIAM Y. PEMBERTON, Chief Justice.

HON. WILLIAM H. HUNT, } Associate Justices.
HON. HORACE R. BUCK, }

ELIZABETH BARRY, RESPONDENT, v. THE WESTERN
ASSURANCE CO., APPELLANT.

(Submitted May 24, 1897. Decided June 1, 1897.)

Homestead Exemption—Head of a Family.

A HUSBAND who lives with his family is the "head of the family," and this relation cannot be destroyed by his failure to support his wife and children, or by the mere fact that he quarrels with his wife and occupies a different bed.

*Appeal from District Court, Silver Bow county. W. O.
Speer, Judge.*

Suit by Elizabeth Barry against the Western Assurance Company on an insurance policy. From judgment for plaintiff, defendant appeals. Reversed.

Statement of the case by the justice delivering the opinion.

The plaintiff (respondent) sued the defendant and appellant to recover \$1,000 alleged to be due and owing on account of an insurance policy issued by the defendant company to plaintiff upon certain property in Meaderville, which said property plaintiff claimed as a dwelling house and homestead.

It is conceded that the house was destroyed by fire about September 20, 1893. The defense raised by the answer was to the effect that about September 25, 1893, certain creditors sued the plaintiff, and issued writs of attachment, and attached all moneys in the possession of this defendant and its agents (in the manner provided by law) belonging to plaintiff, and thereafter recovered judgment against the said Elizabeth Barry, and issued executions, and that thereafter the defendant company paid over to the sheriff under the executions all moneys which might be due under the policy.

In her replication plaintiff alleges that she is now, and has been for many years, a married woman, and a sole trader and the head of a family; that she built and constructed the house which was destroyed by fire, and upon which she procured the insurance, out of her own earnings; and that she claimed the premises as a homestead.

There was a trial and judgment in favor of plaintiff. The defendant moved for a new trial, which motion was overruled. From the judgment and order overruling the motion for a new trial, defendant appeals.

Chas. R. Leonard and *J. W. Cotter* for Appellant.

W. S. Shaw, for Respondent.

HUNT, J.—The plaintiff's principal contention is that the money due to her under the insurance policy was exempt

from levy by attachment in the hands of the company because the house destroyed was her homestead, and because she was the owner thereof and was the head of a family. The appellant, on the other hand, argues that plaintiff was not the head of a family, and was not, therefore, entitled to claim a homestead exemption. If, therefore, the privilege of claiming exemption of the property destroyed as a homestead is available to plaintiff at all, it is because the evidence has established her headship of the family. We are thus obliged to look into the facts to ascertain whether her relation as the head of the family was established. In doing this we shall only regard the plaintiff's testimony.

It appears that Mrs. Barry and her husband had been married for 32 years before this suit was tried, and lived and cohabited together until the last eight years before the fire destroyed the property involved in this suit. They had a large family, including four minor children. Mrs. Barry appears to have been an industrious woman, and in the later years of her married life to have been the main support of the children. The husband, Barry, was evidently a lazy man, content to allow his wife to do most of the work whereby a support was obtained for his wife and children. To use his own language on this point: "She managed to support them. I thought it was all right anyhow." At times he was away mining, but returned at intervals, and lived with his family, although during the past eight years he did not sleep in the same house with his wife, but had a bed in a little cabin in the end of the yard back of the main house. He admitted the knowledge of his obligation to support his family, and that it was his own fault to a great extent that he had not been steadily at work, and said that he often had "little spats" with his wife, and would leave because his presence was not wanted. The house which was burned seems to have been kept for a time as a boarding house by Mrs. Barry, and the debts for the payment of which the insurance money was attached were contracted by her. She was a sole trader and doing business on her own account. The insurance was originally written in

the name of her husband, James F. Barry, but it was afterwards transferred to the plaintiff in this suit.

Under this evidence we do not think Mrs. Barry can be held to be the "head" of the Barry family, as the term is used in the statute exempting homesteads. Ordinarily the husband is the head of the family. He is the parent, if living, whom the law first recognizes as having a right to have a home for his family protected and secured. From the natural relation existing between husband and his wife and children, there arises a duty upon him, both moral and legal, to support his family; but his legal headship of the family cannot be destroyed because of a mere dereliction of duty on his part. It is clear to us that, if the property had been seized for a debt of Mr. Barry, he could have claimed its exemption as a homestead. It was the residence of his wife and children, and his home. There was no such change in his relations with his family as would impair his homestead rights. *Carrington v. Herrin*, 4 Bush, 624. The circumstance that Barry was not on the best terms with his wife, and occupied a different bed, even when considered with his general indisposition to support his family, cannot change the law. It was an unhappy family; that is all; but the husband was none the less the head of it.

The order denying a new trial, and the judgment, are reversed and the cause is remanded.

Reversed and Remanded.

PEMBERTON, C. J., and BUCK, J., concur.

WALTER W. ARNOLD, RESPONDENT, v. WALTER PASSAVANT, ET AL., APPELLANTS.

(Submitted May 14, 1897. Decided June 1, 1897.)

Pleadings—Water Rights—Abandonment.

PLEADINGS—The complaint alleged that the plaintiff was the owner of all the waters of a stream; the answer denied the appropriation, and also alleged that plaintiff until 1879 (subsequent to defendants' appropriation) had no use for any greater quantity of water than 50 inches and that his appropriation in excess of that amount was void. *Held*, that the allegation in the answer was not affirmative matter and that no replication was necessary.

WATER RIGHTS—*Did once in Using Water*—The evidence showed that plaintiff had 180 acres of land which could be covered by water from his ditches in 1869. *Held*, that the mere fact that for years he only cultivated 45 acres of land, does not show that he had been guilty of a lack of diligence in using the water for some beneficial purpose.

Appeal from District Court, Lewis and Clarke County.
Henry N. Blake, Judge.

ACTION by Walter W. Arnold against Walter Passavant and others to establish a claim to certain water rights. From the decree for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Statement of the case by the justice delivering the opinion.

In 1874, plaintiff and his partner, one Barnes, purchased two ranches, each 160 acres in area, and a water right appurtenant to one of them. A United States patent for one of these ranches was issued in 1875. The other ranch had not been filed on by the owner from whom it was purchased, but subsequently plaintiff filed on it as a homestead, and later obtained a patent. Plaintiff afterwards acquired the interest of his partner Barnes in all this property. At the time of the purchase, the previous owners of these ranches had diverted waters of Spokane creek by means of two ditches, for the purpose of irrigating the ranch patented in 1875.

In 1878 one Miller commenced the construction of a ditch

tapping Spokane creek several miles above the head of plaintiff's upper ditch, to divert water from said creek for the purpose of irrigating a tract of 680 acres of land. Miller sold his land and water right to the defendants, the Passavants, in the year 1889.

The complaint of plaintiff sets forth, among its other averments, the diversion of waters of Spokane creek by means of the two ditches aforesaid, for the purpose of irrigating the patented ranch, and the use of said water for said purpose. It also alleged that on the 26th day of February, 1879, plaintiff had entered, as a homestead, the other ranch acquired by him and his partner, and, ever since said last-named date, had used the waters of the creek, supplied by the large ditch, for the purpose of irrigating said homestead.

The answer denied that the smaller of plaintiff's ditches had ever tapped Spokane creek, and that water by means of it had ever been conveyed from said creek. There was a similar denial as to the larger ditch. The answer also denied that, for a period of 16 years, the plaintiff had ever used any of the waters of said creek for irrigating any of his land. For a separate defense, it set forth in paragraph three that prior to 1879 plaintiff was the owner of only 160 acres of land; that, of the 160 acres aforesaid, only 30 or 40 acres were susceptible of cultivation or irrigation; and that until 1879 the plaintiff had had no use for any greater quantity of water than 50 inches; and that any appropriation in excess of 50 inches was void. For another defense, it set forth Miller's water right, and a continuous use thereof. It alleged an adverse and exclusive use of all the waters of Spokane creek by the defendants, the Passavants, and their predecessor in interest, Miller, for a period of some 15 years (the period necessary under the statute being only five years). It further alleged as an estoppel that plaintiff had stood by and allowed Miller to expend money on his ditch without protest, and had acquiesced in the exclusive use of all the waters of the creek by Miller and the said defendants for a period of some 15 years.

The replication denied that Miller had acquired his water right prior to 1891. It also denied in detail the allegations in the answer as to adverse possession and estoppel. On the trial the plaintiff was permitted, without objection, to introduce evidence to establish the fact that he himself had used the waters of Spokane creek both on his patented and his homestead ranch ever since 1874.

The case was tried with a jury. The jury made special findings substantially as follows: The carrying capacity of plaintiff's lower ditch was 50 inches. Water was used through this ditch in the year 1866.

The carrying capacity of plaintiff's upper ditch was 150 inches. Water was used through this ditch on plaintiff's patented ranch in 1869, and on his unpatented ranch the same year. Of the patented ranch, 125 acres could be covered by water from the upper ditch, and 15 acres by the smaller ditch. On plaintiff's patented ranch, at the time of Miller's appropriation of the water, 30 acres of plowed land had been irrigated. On plaintiff's homestead ranch there were about 40 acres which could be covered by water from his upper ditch; and on said homestead ranch five acres of plowed land and 10 acres of hay land had been actually irrigated at the time of the Miller appropriation of water. Miller knew, at the time he commenced to construct his ditch, of the water right of plaintiff. Plaintiff did not suffer Miller to expend money in the construction of the ditch without giving him notice of his water right. Miller made his appropriation subject to plaintiff's right.

Finding No. 16 was as follows: Question: "Did Miller, during the time he owned the ranch, claim in hostility to Barnes and Arnold, or Arnold, as himself owning the first right, or did he only claim and assert a second right subject to theirs?" Answer: "He claimed first right."

Finding No. 17 was as follows: Question: "Was Miller's use of the water in defiance of plaintiff's right, or did he always admit that plaintiff had the oldest right?" Answer: "He used the water in defiance of Barnes' and Arnold's claim."

The jury found that, in the low-water seasons before 1877, plaintiff had use for all the water naturally flowing down Spokane creek to him ; also, that prior to 1882 plaintiff had irrigated only 45 acres of land on his two ranches, and that 45 inches was sufficient for their irrigation ; that Miller commenced to construct his ditch in 1878, and completed it and used the water through it in 1881 ; and that the capacity of the Miller ditch was sufficient to take all the waters of Spokane creek at ordinary irrigating seasons.

Finding No. 26 was as follows: Question. "Have defendants and their predecessor Miller, at all times since 1880, actually used and claimed all the waters of Spokane creek at the point where the Miller ditch taps said creek, openly and adversely against the plaintiff and all other persons?" Answer : "He claimed it, but did not use it continuously."

Finding No. 27 was as follows : Question : "Have the defendants or their predecessor, Miller, ever recognized the claim of plaintiff to any of the waters of Spokane creek which flow down to the Miller ditch?" Answer : "Defendants did not, but Miller did."

Finding No. 28 was as follows : Question : "Have the defendants or their predecessor, for a continued period of five years, at any one time since 1880, actually and openly and adversely held and used the waters of Spokane creek at the point where the Miller ditch taps said creek, against the claims of the plaintiff and all other persons?" Answer : "The jury is unable to say whether the defendants or their predecessor held the waters or not, but it is satisfied they did not use it continuously for five years."

After the jury had returned their findings, and before the court adopted them, the defendants moved the court to set aside certain of these findings, and to substitute different ones in place of others.

They also asked the court to make additional findings on the following points :

(1) "Are there any springs or other sources of supply below the ditch of defendants that furnish plaintiff with water

for irrigating purposes, and, if so, how much water will said springs or other sources generally supply through the irrigating season?"

(2) "Did the plaintiff and his predecessors use reasonable diligence in applying the water diverted by them from Spokane creek to some useful and beneficial purpose, and, if so, how much of said water was so diligently applied and used?"

On July 2, 1895, the court overruled defendants' motion, adopted the findings of the jury, and signed a decree in favor of plaintiff. In this decree the court made an additional finding, to the effect that there were springs below the ditch of defendants, which sometimes furnished plaintiff with 70 inches of water for irrigating purposes. The decree awarded to plaintiff 110 inches of the waters of Spokane creek, as between him and the defendants the Passavants. It also awarded plaintiff 70 inches of the water furnished by springs rising in the channel of Spokane creek below the ditch of defendants.

Appellants appeal from the decree and the order denying a motion for a new trial.

Smith & Word, for Appellants.

Toole & Wallace, for Respondent.

BUCK, J.—Did the court err in admitting evidence for the purpose of showing that more than 30 or 40 acres of the ranch of plaintiff, patented in 1875, were susceptible of irrigation by means of plaintiff's two ditches?

Appellants insist that, inasmuch as the replication failed to deny the averment in paragraph three of their answer that plaintiff prior to 1879 had no beneficial use for more than 50 inches of said water, said evidence should have been excluded. The defenses as set forth in the answer are somewhat inconsistent; that is, there is an inconsistency between the theory of the defense in the direct denials of the averments of the complaint and the other defenses, including the one embraced in paragraph three.

The mootable question of whether a defendant can set forth

in his verified answer a defense absolutely contradictory of denials therein is not before us. But any toleration by the courts of inconsistent defenses in the same answer is due only to a desire to fully protect a defendant's interests. By setting forth inconsistent pleadings, a defendant should never be allowed to lay a snare for his adversary. This, however, is simply a suggestion so far as the actual merits of this case are concerned.

Plaintiff's complaint, in our opinion, contained averments sufficient to tender a general issue. Defendants' denials raised a general issue. The admission of paragraph three of the answer, that plaintiff was entitled to 50, but no greater, number of inches of the waters of Spokane creek, was simply an attempt to eke out the absolute denial that he was entitled to any of the waters of said creek. Regarded as a defense by itself, said paragraph three is also incomplete. Therefore it did not set forth any new matter requiring a specific denial in the replication. Nor does paragraph three plead sufficiently any abandonment of any part of plaintiff's originally acquired water right, or any lack of diligence in the application of any of the water to a useful purpose, which would be in the nature of an abandonment.

Without deciding whether any lack of diligence or abandonment in respect to plaintiff's water right should have been pleaded in order to admit the evidence to establish the same, nevertheless we think that it would always be the better practice to plead such a defense.

But even conceding that any lack of diligence on plaintiff's part might have been shown under the general issue, the evidence fails to show that plaintiff was guilty of any unreasonable delay in the application of any water to a useful purpose. Plaintiff testified, and he was not contradicted, that he cultivated his land, and used water to irrigate it, as he and his partner got money in their pockets. For all that appears, he was a farmer, struggling for a livelihood, and clinging to his water right for the benefit of the lands for which it was originally acquired. There had been no diversion of water

from this creek by plaintiff or his predecessors for speculative purposes. These lands and this water right appurtenant to them had been acquired prior to any appropriation of any of the waters of Spokane creek by Miller, defendant's predecessor.

The jury found that 140 acres upon plaintiff's first patented ranch, and 40 acres on his other ranch, were capable of being covered with water, by means of the two ditches as early as 1869. By inference from the mere fact that plaintiff had only 45 acres on his two ranches under cultivation, alone, could he have been held guilty of a lack of diligence.

The jury found that prior to 1877, in the low-water season, plaintiff had use for all the water of Spokane creek naturally flowing down to his ditches. If this be true, would he have been justified in attempting to bring more acreage under cultivation? The trial court, under this condition of affairs, committed no error in refusing to find that plaintiff had, or had not, used reasonable diligence in applying any part of the water to a beneficial use.

It follows that the objection that the court refused to instruct the jury on the ground of whether or not plaintiff had used reasonable diligence is also without merit.

Are the findings contradictory? Not in any material respect. It is true, the jury found that Miller and defendants claimed first right and used the waters of Spokane creek in defiance of plaintiff's claim, but they also practically found that the defendants had not established their defense of adverse possession. We think the evidence is sufficient to justify the findings of the jury and the decree of the court. The judgment is affirmed.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

STATE EX REL. JOHNSON, ET AL., APPELLANTS, v. BOARD
OF COMMISSIONERS OF DEER LODGE
COUNTY, RESPONDENTS.

(Submitted May 19, 1897. Decided June 7, 1897.)

Public Roads—Vacating—Damages.

The owners of land along and through which a public road runs are not entitled to damages on vacation of the road by the proper authorities.
By the vacation of a public road there is no taking of private property for public use, within the meaning of Const. Art. 8, § 14.

Appeal from District Court, Deer Lodge County. Theodore Brantley, Judge.

APPLICATION by the state of Montana, on the relation of Herman Johnson and others, for a writ of certiorari to review the proceedings of the board of county commissioners of Deer Lodge county, Mont., in vacating a public road. From a judgment quashing the writ, relators appeal. Affirmed.

Statement of the case by the justice delivering the opinion.

This is an application for a writ of certiorari to review the action of the board of county commissioners of Deer Lodge county in vacating a certain public road, described in the complaint.

It is conceded that the proper steps and proceedings were had, in accordance with the statute, to procure an order of the board of county commissioners vacating the road in controversy. The chief complaint of the petitioners seems to be that the board of county commissioners, when the matter of vacating the road was properly before them, made the order vacating the road, but declined to appoint viewers to pass upon the propriety or necessity of vacating the same, and acted seemingly as viewers themselves, and declined to allow any compensation to the petitioners on account of vacating the road. It seems that the petitioners own land along and

through which said public road runs, and have improved their said lands during the time said road ran through them, before the order vacating the same was made.

The district court issued the writ as prayed for, and on the return day thereof the board of county commissioners, through the county attorney, filed a motion to quash the same on the grounds :

“(1) Because the affidavit and application upon which said writ is asked do not state facts sufficient to entitle said plaintiff to said writ.

“(2) Because said defendant board did not exceed its jurisdiction, as shown by said affidavit and application.

“(3) Because said application for said writ was not made within thirty days after said order was made closing said road.

“(4) Because said plaintiffs were guilty of laches in applying for said writ, in this: That they did not file their application until four months after the order closing said road had been made, and after said road had been closed in pursuance of said order.”

The district court sustained the motion, and quashed the writ. The plaintiffs appeal.

Ed. Scharnikow and W. W. Goodman, for Appellants.

C. B. Nolan, Attorney General, for Respondent.

PEMBERTON, C. J.—The motion of the respondent to quash the writ, which was sustained by the court, and from which action this appeal is prosecuted, is in effect a demurrer to the application or petition of plaintiffs. The question, then, is this: Does the application or petition of the plaintiffs for the writ show in them any such right, or that they have sustained any such injury, as will entitle them to damages on account of the vacating of the road in controversy by order of the defendant board?

The law under which this case was instituted gave the board power to vacate public roads when proper proceedings had

been taken before the board for that purpose. There is no express statute allowing damages to anybody on account of the vacating of a public road by the board of county commissioners. The question here involved has been decided by the supreme court of Iowa. The Iowa statutes are not unlike ours. In *Brady v. Shinkle*, 40 Iowa, 576, the supreme court of that state says:

‘That a landowner may sustain ‘damages,’ according to the common acceptance of the word, on account of the vacation of a highway, as stated in the question, cannot be doubted. It is equally true that inconvenience and damage may result to him by closing a road which is miles away from his land. A farmer may suffer serious loss and inconvenience by the vacation of a highway over which he is accustomed to travel and haul the productions of his farm to market, though his land abuts upon no part of it. All who use the road suffer in the same manner. While one may be more largely injured than others, he yet sustains damages of the same character and nature which all who use the road—the public generally—suffer. While the road exists he has the right to the easement. But this right is not different from that enjoyed by the public generally. His right, then, is such as is enjoyed by the public. His damages are those shared by the public, and no other. It is well settled that in such a case recovery cannot be had by a citizen.

It cannot be claimed that plaintiff’s property, by the vacation of the road, is taken from him, either for public or private use. The right to the continuation of the highway, held in common with the public, if it exists, cannot be claimed to be property of the character which the citizen holds free of governmental interference, except upon receiving therefor due compensation. We hold many rights subject to the control of the state for the public good. The law places the control of highways, with the power to vacate them, out of the reach of the citizen. They are to be exercised for the public good. Inconvenience and damage resulting therefrom are not to be compensated. Each citizen must bear such burdens. They

are imposed as a condition for the enjoyment of the benefits resulting from government.

It will be readily seen that different rights of the citizen are invaded when a road is established than when one is vacated. In the establishment of a highway real property must be taken for public use, and the law provides in such cases for compensation of the landowner. In the vacation of a road the land so taken is restored to the owner, and the right of the public to its use is cut off. The citizen has no right to the continuation of the road, except such as he holds in common with the public. The distinctions between the right of a citizen to the use of an existing highway and his right to its continuation are also plainly discernible. While he may not be deprived of the first right, the second he holds subject to the exercise of lawful authority." To the same effect, see *Ellsworth v. Chickasaw Co.*, 40 Iowa, 571.

There is nothing in the application or petition of the plaintiffs that shows that they have sustained any inconvenience or damage different from that which the public generally has suffered by the vacation of the road in question. If this suit can be maintained for damages, why may not anybody and everybody who may be inconvenienced or damaged by the vacation of a public road by the proper authority have a cause of action against the county, or the person causing such road to be vacated, for damages?

There is, in our opinion, no such taking of private property for public use shown in this case as is contemplated and prohibited by section 14, article 3, of our constitution. The Iowa decisions, quoted at length above, so forcibly and conclusively express the views we entertain of this question that we deem any further discussion of the matter unnecessary. See, also, *Clarke v. City of Providence (R. I.)* 15 Atl. 763; *Kings County Insurance Co. v. Stevens*, 101 N. Y. 411, 5 N. E. 353; *City of Chicago v. Union Building Ass'n*, 102 Ill. 379; *City of East St. Louis v. O'Flynn*, 119 Ill. 200, 10 N. E. 395.

The appellants contend that the defendant board exceeded its jurisdiction in its action relating to the vacation of the

road in controversy. Respondent also contends that the appellants had the right of appeal from the action of the board complained of to the district court, or could have brought a suit by injunction to restrain the action of the board, if illegal or if appellants had any right of action for damages, and that consequently they had no right to institute this proceeding for a writ of certiorari.

Having disposed of the appeal on the ground that plaintiffs have no right of action for damages by reason of any fact stated in their application or petition, it is useless to discuss any minor question presented by the record. We may say, however, that the statutes in force when the order was made vacating the road in question did not require the board to appoint viewers to determine any question of propriety, necessity, or damage before making the vacating order, as in case of laying out new roads, nor has any necessity for such action by the board been shown in this case.

The order and judgment appealed from are affirmed.

HUNT and BUCK, JJ., concur.



MONTANA NATIONAL BANK, RESPONDENT, v. MERCHANTS NATIONAL BANK, ET AL., APPELLANTS.

(Submitted May 18, 1897. Decided June 7, 1897.)

Attachment—Garnishment—Effect Of.

GARNISHMENT—*Effect of.*—By attaching a debt due to the defendant, a plaintiff acquires an inchoate right to a lien upon the property of the garnishee.

WHERE an attachment has been levied upon a debt due the defendant, and an action is subsequently brought against the garnishee, who is insolvent, by a creditor who knows of the attachment, a court of equity will interfere to protect the inchoate right obtained by the attachment and will divide the property of the garnishee between the claimants pro rata.

Appeal from District Court, Lewis and Clarke County.
Henry N. Blake, Judge.

ACTION by the Montana National Bank against the Merchants' National Bank, the Daily Journal company, the

Journal Publishing company and Charles M. Jeffris. From a judgment in favor of plaintiff, and an order denying a new trial, defendants appeal. Modified.

Statement of the case by the justice delivering the opinion.

The facts in this case are substantially as follows: On November 9, 1892, the Montana National Bank instituted an action in the district court of Lewis and Clarke county against the Journal Publishing company for a debt of \$26,424.15. On the same day a writ of attachment was issued in the suit, and pursuant to it the sheriff served notice upon the Daily Journal company for the purpose of attaching the sum of \$8,939.89, a debt due from said Daily Journal company to said Journal Publishing company. The Montana National Bank obtained judgment against the Journal Publishing company for the amount it sued for on November 29, 1892. Subsequent to the service of the writ of attachment aforesaid, and with notice thereof, the Merchants' National Bank sued said Daily Journal company for the sum of \$25,307.43, and on the same day procured a writ of attachment, and caused the sheriff of Lewis and Clarke county to seize all the property of said Daily Journal company. On November 22d the Merchants' National Bank recovered judgment against said Daily Journal company for the said sum alleged to be due it, and on the same day caused a writ of execution to be issued and placed in the hands of the sheriff. The sheriff levied an execution on all the property of the Daily Journal company, and sold the same on December 1, 1892, realizing the sum of \$21,000. On December 1, 1892, the Montana National Bank brought a suit against the Merchants' National Bank, the Daily Journal company, The Journal Publishing company, and the sheriff of Lewis and Clarke county, for the purpose of having applied on its judgment against the Journal Publishing company the amount of the indebtedness from the Daily Journal company to the Journal Publishing company which it had attached.

An answer was filed. The case was tried to the court without a jury. From a judgment in favor of the Montana National Bank, and an order denying a motion for a new trial, the defendants appeal.

McConnell, Clayberg & Gunn, for Appellants.

H. G. McIntire, for Respondent.

BUCK, J.—It is claimed by appellants that the complaint of respondent does not state a cause of action, by reason of its failure to allege that any attachment had ever been levied on any indebtedness due from the Daily Journal company to the Journal Publishing company. Appellants contend that the complaint shows that only property and credits were attached by respondent, and not debts. The complaint is somewhat defective in the allegations as to the attachment of an indebtedness, but upon the trial it was stipulated between appellants and respondent that no claim was made in the action except on account of the attachment of the alleged indebtedness of the Daily Journal company to the Journal Publishing company. The main issue of fact on the trial was as to whether there was any such indebtedness or not. Having entered into this stipulation, and the issue aforesaid having been tried, we are satisfied that appellants are in no position to take advantage of the alleged defect in the complaint. It would not be fair to allow them to raise this point. Moreover, the complaint alleges "that at the time of the service upon it of the writ of attachment and notice, the Daily Journal company owed the Journal Publishing company the sum of \$9,039.89, and that said sum, so owing from said Daily Journal company to said Journal Publishing company, and so as aforesaid by said plaintiff attached and garnished, is still owing and wholly unpaid."

We proceed at once to the main issue of law involved. Appellants state their position as follows: "Under our statutes, no lien is created, by virtue of an attachment, either upon the property of the garnishee or upon the property of the defendant in the garnishee's possession."

Neither the words "garnish," "garnishment," "garnisher," or "garnishee" appear in the Montana attachment statutes. The sheriff is commanded by the writ of attachment to attach the property of the defendant, whatsoever its character—whether capable of actual possession or of constructive seizure only. But we will use the terms aforesaid for convenience in this opinion.

As to a chattel capable of manual delivery in the possession of a garnishee, we cannot agree with appellants that no lien results from the garnishment. An inchoate lien or right is acquired by garnishment as to such chattel. See *Reed v. Fletcher* (Neb.) 39 N. W. 437, and *Northfield Knife Co. v. Sharpleigh*, Id. 788; also *Focke v. Blum*, 82 Tex. 436, 17 S. W. 770, and *Smith v. Bridge Co.*, 13 Ill. App. 572.

In this case, however, a debt was garnished, and just what right in connection with the property of the garnishee was acquired by virtue of the garnishment is a question of difficulty. Is the garnisher of a debt substituted only to the right of the creditor of the garnishee, or does he acquire, by virtue of the garnishment, a right different in the power of enforcement from such creditor's right? To hold that he does not would be almost to declare the statute permitting a garnishment of a debt a nullity. If there is a mere substitution, the garnishee, particularly if insolvent, can ignore the garnishment by disposing of all his property, and thereby absolutely defeat any practical gain from the process. On the other hand, it would not do to hold that, by the mere service of the notice of attachment, a specific lien is created upon any property of the garnishee. The garnishee's right to deal lawfully with his own property cannot be disregarded, and must be carefully preserved. It was manifestly the intention of the legislature, in framing the attachment laws of Montana, however, to give some practical advantage by virtue of legal process to the diligent creditor who garnishes a debtor of his debtor, as well as to a creditor who actually attaches tangible property or garnishes a chattel capable of manual delivery.

In *O'Brien v. Insurance Co.*, 56 N. Y. 52, an insurance

company was garnished for a debt due a debtor of the plaintiff, and the court said (the statutes of New York being substantially the same as those of Montana) that the effect of the garnishment was to impound the debt—that is to say, to take it into the custody of the court—as effectually as a seizure of chattels capable of manual delivery.

In *North Star Boot and Shoe Co. v. Ladd*, (Minn.) 20 N. W. 334, an insurance company owing the defendant was garnished, and the court said: “The garnishment is in effect an attachment of the ‘indebtedness’ of the garnishee to the defendant.

“Though, technically speaking, it may not give a specific lien upon such indebtedness, its effect in conferring upon the plaintiff a specific right, over and above that of a mere general creditor, to the indebtedness for the payment of his claim, is substantially analogous to that acquired by an attachment of tangible property.”

Between the impounding of the debt itself, however, and the acquiring of a specific lien upon the property of the garnishee, there is a marked difference; at least, in so far as the garnishee's right to deal in good faith with his own property is concerned. Yet, if a debt is impounded—taken into the custody of the court—is it not the duty of the court to preserve, so far as lies in its power, any right of the garnisher as against a subsequent attaching creditor who invokes its process in hostility to any such right?

The Daily Journal company had assets worth \$21,000. It owed the Merchants' National Bank \$26,424.15 and the Journal Publishing company \$8,939.89. These assets constituted its sole and only means of payment—or, rather, part payment—of said debts. The object of the attachment statutes is to reward diligent creditors. Respondent served notice of its garnishment before the Merchants' National Bank levied its attachment, and used the utmost diligence, apparently, to obtain an actual benefit from this garnishment. Under the statutes of the state respondent was in no position to obtain a judgment against the garnishee until after it had

obtained a judgment against its direct debtor. But the judgment was not obtained until November 29th, and at that time all the assets of the garnishee, the Daily Journal company, had been seized and advertised for sale by the sheriff under the execution issued on the judgment of the Merchants' National Bank against its debtor, obtained on November 22d. The property was sold on December 1st, and on that day the respondent commenced this action in equity against appellants, thereby availing itself of the only practical remedy left to it. Proceedings supplemental to execution would have been idle and inadequate under the circumstances.

No direct question arises here, as between the garnishee or any person dealing with it without notice and the garnisher, with reference to any specific lien on the former's property while actually engaged in business. The Daily Journal company is a lifeless and hopelessly insolvent corporation. The contest is strictly between the two creditors as to its assets, each claiming by virtue of its attachment. Even on the theory that the only right acquired by respondent through its garnishment was a substitution to the rights of the Journal Publishing company as against the Daily Journal company alone, was there any complete substitution? If there had been a full and complete substitution, at the very moment the notice of garnishment was served on the Daily Journal company, respondent might have sued for the debt due the Journal Publishing company and taken the tangible property of the Daily Journal company into legal custody by direct attachment. As stated, however, respondent was in no position to sue the Daily Journal company until November 29th, when it obtained its judgment, and at that time all the assets had been advertised for sale, and were actually sold by the sheriff two days later. If the service of the notice of garnishment by respondent through the court was not the commencement of a proceeding to reach the assets of its debtor, then the law permitting the garnishment of a debt is a nullity, at least so far as this case is concerned. We are of the opinion that, as to the Merchants' National Bank, respondent acquired an inchoate right to a lien as to the property of the

Daily Journal company by virtue of this garnishment. By service of the garnishment respondent took the first legal step necessary to the possible perfection of a lien, and the judgment finally obtained as to the Daily Journal company perfected the lien and the right initiated thereto by the service.

When the Daily Journal was garnished by respondent, it was notified by the court to hold its debt to the Journal Publishing company for the benefit of respondent. It became in a sense the agent of the court for that purpose. Hence the Daily Journal company could not have assigned all its assets for the benefit of its one creditor, the Merchants' National Bank, to the exclusion of respondent's right after the notice of garnishment was served. The law could have been invoked to prevent any such assignment. And yet of the same court which would have restrained any such assignment the Merchants' National Bank demands identically what would have been the result of such an assignment. Unquestionably, however, had the Daily Journal company, after it had been garnished, seen fit to make an assignment for the benefit of both its creditors, it could have done so.

And from this it follows that the right to a lien initiated by respondent by virtue of its garnishment, so far as the Merchants' National Bank is concerned, was only what pro rata interest respondent would have been entitled to receive had a general assignment been made by the Daily Journal company for the common benefit of both its creditors. To this extent alone is respondent entitled to a portion of the \$21,000 realized from the sale of the assets of the Daily Journal company—of course, with interest thereon from the time appellants withheld it.

It is held in the decisions of some of the states that a court of equity will not interfere to protect an attachment lien. For such a doctrine we are unable to find any sound reason.

The case is remanded, with directions to the lower court to enter a decree in accordance with the views herein expressed. It is also ordered that each side in this appeal pay its own costs.

PEMBERTON, C. J., concurs. HUNT, J., disqualified.

INDEX.



INDEX.

ABANDONMENT.

WATER RIGHTS, 2—Of homestead, see MORTGAGES. 3.

ABATEMENT.

See DOWER, 1.

ACCIDENT INSURANCE.

INSTRUCTIONS, 2—EVIDENCE, 2, 3, 4.

ACCOMMODATION.

See NEGOTIABLE INSTRUMENTS.

ACCOUNT STATED.

1. An account stated is a balance ascertained between the parties to a settlement; upon the settlement, the law implies a promise to pay the balance found due.—*Voight v. Brooks*, 374.
2. In an action upon an account stated, it is not necessary to allege a promise to pay.—*Id.*

ACKNOWLEDGMENT.

Under the laws then in force an acknowledgment of the execution of such a mortgage by a married woman which stated that she "acknowledged the same as her free act and deed," and failed to state that it was made "on examination apart from and without the hearing of her husband," was absolutely void.—*American S. & L. Association v. Burghardt*, 323.

ACTIONS AND SUITS.

See INTEREST, 1—PLEADINGS—REMEDIES—VENUE.

ADMINISTRATORS.

See EXECUTORS AND ADMINISTRATORS.

ADMISSIONS.

See PLEADINGS.

ADVERSE POSSESSION.

See EVIDENCE, 20.

ADVERSE CLAIMS.

See PLEADING, 29.

AGENCY.

See CORPORATIONS, 7, 11, 12.—EVIDENCE, 17.

ANNULMENT.

See LEASE, 1.

APPEALS.

See EVIDENCE—INSTRUCTIONS—JUDGMENT ROLL—NEW TRIALS—PRACTICE—PRESUMPTIONS.

1. An order of the district court sustaining a defendant's pleas of formal acquittal and jeopardy, after the reversal of a conviction for manslaughter under an indictment charging murder in the first degree, is not an appealable order under subdivision 4 of section 2273 of the Penal Code, providing that an appeal may be taken by the state "from an order made after judgment, affecting the substantial rights of the state," since the defendant, after his conviction was set aside by the appellate court, stood before the court in the same position as if no judgment had been rendered against him.—*State v. O'Brien*, 6.
2. An order denying a new trial will be affirmed on appeal where the record contains no statement of the case, or specifications of errors of law or insufficiency of evidence.—*Wood v. Helm*, 22.
3. Where in a lien foreclosure the defendants, some of whom claimed under a prior mortgage and one under a prior judgment lien, united in the defense, all being represented by the same counsel, and on the trial the mortgagee defendants prevailed while the judgment defendant was defeated, and on an appeal by the plaintiff and the unsuccessful defendant the original counsel for the defendants who represented them below again appeared insisting that there was still no conflict of interests between their clients, while new counsel then appearing for the mortgagee defendants for the first time insisted that there was a conflict of interests and objected to the jurisdiction of the appellate court because no notice of appeal was served on the mortgagee defendants by their co-defendant, the supreme court will, under such circumstances, entertain jurisdiction of the appeal and provide for a determination of the rights of the mortgagee defendants so far as they may be affected by a reversal on their co-defendants' appeal.—*Johnson v. Puritan Mining Co.*, 30.
4. The statute (section 2171, Penal Code) requiring a notice of at least two days to the county attorney of the presentation of a bill of exceptions to the judge for settlement is mandatory, and where the record on appeal does not show affirmatively that such notice was given the bill of exceptions will not be considered. (*McKay v. Montana Union Railway Co.*, 13 Mont. 15, cited.)—*State v. Gawth*, 48.
5. Error of the court in refusing to instruct the jury to acquit the defendant for insufficiency of the evidence to warrant a conviction will not be considered where the record does not properly present the evidence for review.—*Id.*
6. Under section 2194 of the Penal Code, providing in effect that a motion for a new trial, if error has been committed by the court in misdirecting the jury in a matter of law, or if the court has erred in the decision of any question of law arising during the course of the trial, or when the verdict is contrary to the law or evidence, must be made on a bill of exceptions, and the notice of motion must designate the grounds upon which the motion will be made,—alleged error in instructions will not be reviewed on appeal where the only ground designated is that the verdict is contrary to law and evidence. (*Froman v. Patterson*, 10 Mont. 107, cited.)—*Id.*
7. A motion for a rehearing will not be granted on a second appeal where the contention of the moving party, if sustained, would require a reversal of the decision on the former appeal.—*Priest v. Eide*, 53.
8. On appeal a divided court affirms the judgment.—*Wilson v. Harris*, 69.
9. Omission of the court to make findings upon an immaterial issue is not an error of which the appellants can complain where the evidence on the issue was meagre and the court offered to permit them to introduce further testimony upon the point before adopting the findings of the jury, which offer was refused.—*Sloan v. Glancy*, 70.
10. Where the only evidence in the record shows that the amount of P's appropriation was from 50 to 60 inches, a finding fixing the amount at 150 inches is not sustained by the evidence.—*McDonald v. Lannen*, 78.

11. The appeal was from the judgment and from the order denying C's motion to open the default; only one cost bond was filed; respondent did not make any motion to dismiss upon this ground; but the point was raised in his brief and oral argument. *Held*, that the error, if any, could not be presented in that manner. *Held, also*, that only one cost bond is necessary on an appeal from a judgment and order contained in one record.—*Morse v. Callantine*, 87.
12. Where respondent moves to dismiss an appeal on account of defect in the appeal bond, appellant may file a sufficient bond, before the motion is decided.—*Id.*
13. The practice of incumbering a record with immaterial matter and numerous assignments of error which are not relied upon, is commented upon by the court.—*General Electric Co. v. Black*, 110.
14. As a defense to an action to foreclose a mortgage, defendants contended that plaintiff agreed to deliver the money borrowed to one "K" to be used in a business venture, and that "K" was to repay plaintiff from the profits, that plaintiff, instead of so doing, kept the money and used it in the same venture, and failed to apply upon the debt moneys realized from the business; plaintiff claimed that the agreement was that he was to carry on the business until the amount borrowed was repaid from the venture and that he was then to turn the business over to "K;" that he carried out his agreement, and that the net amount realized was so applied, but left a deficit, the amount sued for. *Held*, that the finding of the jury upon these issues in favor of the plaintiff, being supported by the evidence, would not be reversed by the appellate court.—*Huston v. Nuss*, 118.
15. Where the appeal is from the judgment alone, it will be presumed that the issues raised by the denials of the answer were sustained by the evidence, and that the facts found by the jury accord with the allegations contained in the complaint.—*Hefferlin v. Krieger*, 123.
16. Where the notice of intention to move for a new trial does not specify "the insufficiency of the evidence, etc.," as one of the grounds of the motion, the verdict cannot be disturbed upon that ground.—*Mulligan v. Montana Union Railway Co.*, 135.
17. Instructions must be considered as a whole; and where instructions are given which contain the correct rule as to the duty of the master to furnish suitable machinery and inspection of the same the verdict should not be reversed because another instruction may not give the law on that subject fully.—*Id.*
18. Where the evidence was in the form of depositions; *held*, that under such circumstances, the appellate court would review the evidence; and *held*, accordingly, that the evidence fairly showed a personal service of summons in the action.—*State ex rel. v. Giroux*, 149.
19. Error cannot be based upon a refusal to admit in evidence a judgment which was subsequently allowed to be introduced.—*Id.*
20. Where the evidence is conflicting, the findings of facts by the court will not be disturbed by the appellate court.—*Reardon v. Patterson*, 231.
21. Where the testimony of a witness is stricken out, and then is subsequently admitted, the error, if any, in striking out the testimony is immaterial.—*Id.*
22. Where no demurrer to the complaint was filed, or where defendant answered after demurrer was overruled, a judgment will not be reversed because the complaint was ambiguous. *Sanders v. Billings Water Co.*, 236.
23. On an appeal from a judgment entered upon an amended complaint, it is not necessary to include in the transcript the original complaint, the demurrer thereto, or the order made by consent sustaining the demurrer.—*Butte Butchering Co. v. Clarke*, 306.
24. All motions and orders referred to in affidavits used on a motion to open a default should be made a part of the transcript on appeal from an order denying such motion.—*Id.*
25. Where the evidence is conflicting, an order denying a motion for a new trial will be sustained.—*McIntire v. McCabe*, 333.
26. The object of rules of court is to facilitate the dispatch of business; they cannot be invoked to bar a right unless a failure to comply with them is clear.—*Pabst Brewing Co. v. Montana Brewing Co.*, 394.
27. Where the evidence is conflicting, an order denying a new trial will not be reversed

- on the ground that the evidence does not justify the verdict.—*Harrington v. B. & B. M. Co.*, 411.
28. An appeal does not lie directly from an order denying a motion to retax costs; the appeal should be from the judgment.—*State v. Miller*, 444.
 29. Under section 1739, Code of Civil Procedure, the certificate of the clerk to the record on appeal should state "that an undertaking on appeal in due form was properly filed."—*Id.*
 30. On an appeal from an order, the presumption is that the order was properly granted, unless the contrary appears from the record.—*Rumney L. & C. Co. v. Detroit and Montana Cattle Co.*, 557.
 31. On an appeal from an order, except when the code otherwise provides, the order, and the paper and evidence upon which the order was granted, should be incorporated in a bill of exceptions, for the purpose of identifying the same.—*Id.*

APPEARANCE.

See JUDGMENTS, 9, 10.

APPROPRIATION.

See WATER RIGHTS.

APPURTENANCES.

See WATER RIGHTS.

ARRAIGNMENT.

See PRACTICE (criminal).

ASSAULT AND BATTERY.

See PRACTICE (Criminal).

ASSESSMENTS.

See TAXES.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See CORPORATIONS, 1.

1. A conveyance by a debtor of certain real estate by quit-claim deed, in trust, to secure the payment of his indebtedness to certain creditors, together with assignments of a contract for the purchase of real estate and of a receipt for a payment on stock in a corporation, for the same purpose, is in effect an assignment for the benefit of creditors.—*Tuttle v. Merchant's National Bank*, 11.
2. Where the trustees of an express trust dies after instituting an action to confirm his title to the trust property, a court of equity has inherent power, independently of statute, to appoint a new trustee on its own motion and order his substitution as plaintiff.—*Id.*
3. Where a debtor executes and delivers a bill of sale of a frame building situated upon leased ground, the leasehold to which had expired, to a trustee to secure certain creditors, an unpreferred creditor who attached the building as realty after its transfer to the trustee is not in a position to urge that the transfer is void because the building was personalty and there was no delivery or immediate change of possession as required by section 226, Fifth Division of the Compiled Statutes, since, if the building was personalty, no valid levy was made, and if it was realty it was sufficiently delivered by the conveyance to the trustee made prior to the attachment. And in the absence of circumstances tending to show fraud, a fraudulent intent on the part of the debtor cannot be deduced from want of immediate physical occupation of the building by the trustee considering the nature of the property, where the evidence

tended fairly to show that the assignor by his conduct and by the delivery of written instruments, intended to and did voluntarily surrender to the assignee possession of the property for the benefit of his creditors.—*Id.*

4. In such case the transfer to the trustee of a receipt for a payment on shares of stock, which was the only instrument which the debtor had evidencing his interest in the stock, was a sufficient delivery as against creditors not provided for in the trust deed, it appearing that the trustee afterwards voted the stock at the corporation's meetings and otherwise exercised full possession of it.—*Id.*
5. An assignment for the benefit of creditors which provides that the assignee may sell "for cash or credit," is void as to attacking creditors.—*Willoughby v. Reynolds*, 421.

ATTACHMENT.

1. The lien of an attachment upon real estate is prior to the lien of a judgment obtained prior thereto, but not docketed until after the levy of the attachment.—*Sklower v. Abbott*, 228.
2. By attaching a debt due to the defendant, a plaintiff acquires an inchoate right to a lien upon the property of the garnishee.—*Montana National Bank v. Merchants National Bank*, 586.
3. Where an attachment has been levied upon a debt due the defendant, and an action is subsequently brought against the garnishee, who is insolvent, by a creditor who knows of the attachment, a court of equity will interfere to protect the inchoate right obtained by the attachment and will divide the property of the garnishee between the claimants pro rata.—*Id.*

ATTORNEY AND CLIENT.

See EVIDENCE, 12.

1. M testified that he considered S as an attorney; S advised M but did not consider himself as the attorney of M and did not charge any fee for his opinion. Held, that the testimony of S concerning the conversation of M at the time was properly stricken out, for the reason that the evidence established the relation of attorney and client.—*Davis v. Morgan*, 141.
2. Under section 1394, Code of Civil Procedure, which provides the "costs of partition, including reasonable counsel fee expended by the plaintiff or either of the defendants for the common benefit * * * must be paid by the parties entitled to share in the lands, etc." The services of plaintiff's attorney in preparing the complaint and in conducting the trial should be included in the costs of the action, as they are for the "common benefit."—*Murray v. Conlon*, 889.

AUSTRALIAN SYSTEM.

See ELECTIONS.

BAIL.

See PLEADINGS, 4, 5, 6, 7.

Where the defendant in a criminal action gives bond for his appearance, and the bond is forfeited for his non-appearance, he should move to set aside the forfeiture, if he has sufficient excuse for not appearing.—*State v. Wrote*, 208.

BALLOTS.

See ELECTION.

BILL OF EXCEPTIONS.

See APPEALS—PRACTICE—JUDGMENT ROLL.

CONSTITUTION.

BILL OF SALE.

See EVIDENCE.

BONDS.

See RES ADJUDICATA—INTEREST—PLEADINGS, 4, 5, 6, 7, 13—APPEALS.

BONA FIDE PURCHASER.

See FRAUDULENT CONVEYANCES—NEGOTIABLE INSTRUMENTS—PLEADING—TRUSTS

BURDEN OF PROOF.

See EVIDENCE, 2, 20—MINING CLAIMS, 2—NEGOTIABLE INSTRUMENTS—TRUSTS.

CHECKS.

See NEGOTIABLE INSTRUMENTS.

CITIES.

See MUNICIPAL CORPORATIONS.

CLAIM AND DELIVERY.

See EVIDENCE, 10, 13.

COLLATERAL ATTACK.

See JUDGMENTS, 5.

COLLATERALS.

See PLEDGE, 1.

CONDITIONAL SALES.

See SALES OF PERSONAL PROPERTY.

CONFIRMATION OF OFFICERS.

See MUNICIPAL CORPORATIONS.

CONSPIRACY.

See EVIDENCE, 19, 23.

CONSTITUTION.

See EMINENT DOMAIN—OF INDEBTEDNESS OF CITIES, see MUNICIPAL CORPORATIONS—PUBLIC ROADS.

1. The funding by a city of an existing indebtedness by the issuance of bonds does not create a new or additional indebtedness within section 6, article 13 of the constitution, limiting the indebtedness which may be incurred by a city, but merely changes the form of the liability. (*Hotchkiss v. Marion*, 12 Mont. 218, followed.)—*Palmer v. City of Helena*, 61.
2. Where the assessment of a city for a given year is the basis for calculating the three per cent. indebtedness which the city may incur under the constitutional limitation, and the whole bonded indebtedness is less than three per cent. of the assessment for such year, outstanding warrants issued for indebtedness incurred under the assessment of that year may be lawfully funded by the issuance of bonds to an amount equal to the difference between the debt and three per cent. of the assessment.—*Id.*

3. Section 6, article 18 of the constitution and section 4800 of the Political Code, forbidding the creation by a city of an indebtedness greater than three per cent. of the assessed value of property within its limits, unless the creation thereof is necessary and authorized by a vote of the taxpayers, for the purpose of constructing a sewer or water system, prohibits the creation of an indebtedness beyond the three per cent. limit for such purposes by a city which had its sewerage system at the time of the adoption of the constitution.—*Id.*
4. The act of 1891, page 267, requiring railroad companies to fence their road with fences "suitable and amply sufficient to prevent live stock from getting thereon," or else to respond in damages for animals killed or injured, except when "occasioned by the wilful act of the owner or his agent," is not unconstitutional.—*Beckstead v. Montana Union Railway Co.*, 147.
5. Creating a new county by a special act is not forbidden by section 26, article 5 of the state constitution, which provides that "The legislative assembly shall not pass local or special laws * * * regulating county or township affairs, etc."—*Holliday, Treasurer, v. Sweet Grass County*, 864.
6. Sweet Grass county was formed of territory formerly included in three other counties. The law creating the county provided that the county commissioners of Sweet Grass county should meet the commissioners of each of the other counties on certain specified and separate dates, to adjust the portion of the debt of each of the three counties which the new county was to assume; that, when each county debt should be adjusted, the Commissioners of Sweet Grass county should issue to each of the other counties, from time to time, a warrant or warrants therefor, payable to * * * the three counties respectively. *Held*, that the law contemplated the issuance of the warrant to each county on the date fixed for the adjustment of the portion of its debt to be assumed by Sweet Grass county.—*Id.*
7. Under section 3, article 16 of the constitution, providing that upon the establishment of a new county "it shall be held to pay its rateable proportion of all then existing liabilities of the * * * counties from which it is formed," Sweet Grass county was liable for interest upon its portion of the debt of each county until it issued its warrant in payment for that portion.—*Id.*
8. Session laws of 1893, page 150 (Civil Code, section 978-984) originated in the senate. The law provides that the owners of railroads or steamboats for the transportation of passengers shall provide each agent, who is authorized to sell tickets, with a certificate of his appointment, that "such agent ——— shall exhibit the same to the secretary of state, ——— and at the same time shall pay to the said secretary of state a license fee of one dollar" whereupon the secretary shall issue a license. *Held*, that the law is in the nature of a police regulation and is not for revenue purposes; and that, therefore, the fact that the bill originated in the senate is not in violation of article 5, section 32 of the constitution, which provides that all bills for raising revenue shall originate in the house of representatives.—*State v. Bernheim*, 512.
9. A title of a bill was as follows: "An act to regulate the sale and redemption of transportation tickets of common carriers." The act provides for a certificate of the appointment of agents to sell such tickets, and the issuance of a license, and that such certificate and license shall be posted for the information of travellers. The law also makes it unlawful for any person who is not in possession of such certificate and license, to sell tickets, and provides a penalty for violating that portion of the act. *Held*, that the subject of the act is clearly expressed in the title; and that the penalty imposed is merely an incident to the regulation of the sale and redemption of transportation tickets which is the subject of the law.—*Id.*

CONSTRUCTIVE TRUSTS.

See TRUSTS.

CONTESTED ELECTIONS.

See ELECTIONS.

CONTRACTS.

Modification of, see LEASES—ESTOPPEL—MUNICIPAL CORPORATIONS.

1. S, who had conveyed to the defendant corporation land to which he did not have perfect title, deposited stock in escrow the terms of which provided that, if S at any time when the title could be perfected failed to make the payments necessary to obtain the deed, the defendant might make the payment, and should thereupon be entitled to so much of the stock as should at its then cash value be equal to the amount so paid by it. *Held*, that when S failed to make payment, defendant might do so, and that in the absence of fraud S was not entitled to notice.—*Pabst Brewing Co. v. Montana Brewing Co.*, 294.
2. Under such a contract neither S nor his assignee, the plaintiff, was entitled to recover the full amount of stock in escrow upon tendering to defendant the amount which it had paid to perfect title.—*Id.*
3. Plaintiff having contracted for the erection of a building upon his own premises, which adjoined defendant's hotel, agreed to lease to the defendant the two upper stories thereof for the term of five years "from the completion of said three-story building * * * which said building shall be completed on or before September 1, 1924, and upon such completion said term of five years shall begin and date therefrom." *Held*, that time was not of the essence of the contract.—*Lynch v. Bechtel*, 548.

CONTRIBUTORY NEGLIGENCE.

See BURDEN OF PROOF—EVIDENCE, 2, 3, 4—DAMAGES—INSTRUCTIONS.

CONVERSION.

See EVIDENCE, 10, 13, 22, 23—PLEDGE.

CONVEYANCES.

See WATER RIGHTS—COVENANTS.

CORPORATIONS.

See MUNICIPAL CORPORATIONS.

1. An insolvent corporation, in the absence of any statute to the contrary, has the power to make an assignment for the benefit of creditors with preferences.—*Ames & Frost v. Heslet*, 188.
2. Although the property of a corporation may be a trust fund for its creditors, that does not give such creditors a lien upon such assets.—*Id.*
3. The president of a mining corporation bought a mine adjacent to the property of the company for \$45,000. He and another director "C" who together owned or controlled nearly two-thirds of the stock of the company then falsely represented to the plaintiffs who are stockholders and one of whom is a director of the company, that the mine had cost \$95,000 and was actually worth \$110,000, that unless the company bought the mine it would be involved in an expensive litigation, and that if the plaintiffs did not give their consent to the purchase and to the execution of a mortgage, they had control of enough stock to act without it. There were five directors of the company. The plaintiffs relying upon the truthfulness of the representations agreed to allow their stock to be voted in favor of a mortgage to be executed by the company in carrying out the purchase. Subsequently a meeting of the board of directors was held at which there were present four directors including the president and his co-conspirator, and thereupon a resolution was adopted to purchase the property from the president, he not voting; and at the same meeting it was also resolved that a stockholders' meeting should be called to authorize the execution of a mortgage upon the property of the company, including the mine thus bought, to secure the purchase price of the latter. The capital stock of the company is divided into 200,000 shares; at this meeting of the stockholders 208,000 shares were represented; of which

the president owned 47,501 shares, and 133,365 shares were owned by the wife of "C," and were controlled by "C;" there were no votes cast against the resolution to mortgage, and only 220,548 were cast in its favor, as the president did not vote, and as "C" did not vote the one share held by him. The mortgage was executed to a trustee for the bondholders; upon default in the mortgage, foreclosure proceedings were commenced; thereupon plaintiffs who are minority stockholders and one of whom is a director, brought this suit to enjoin the prosecution of the foreclosure. *Held*, that the purchase by the board of trustees was fraudulent and invalid as to plaintiffs; *Held*, further, that the mortgage was fraudulent and void under the laws of Montana, because the transaction would not have received the number of votes required, if "C" had not caused the shares of his wife to be voted in its favor.—*Gerry v. The Bismarck Bank*, 191.

The directors of a corporation are trustees, and cannot use their position for their personal profit.—*Id.*

After obtaining possession of the mine, the company under the management of "B" and "C" expended more money than was expended when the company was earning dividends; thus an indebtedness was incurred which brought about the foreclosure. *Held*, that under the facts of this case "B" having gained an advantage through his own wrong, it was not necessary for plaintiffs to first offer to restore the mine to "B" or place him in *status quo*.—*Id.*

Held, that under the facts in this case, plaintiffs could bring this suit without proving or alleging a refusal of the board of directors so to do.—*Id.*

4. The trustees of the corporation who filed a report which did not specify as a debt of the company its liability on a covenant of title, are not liable for a false report, if at the time the report was filed, the breach of the covenant was not known to them. (§ 460, Fifth Division of the Compiled Statutes, § 451 of the Civil Code construed.)—*Giddings v. Holter*, 263.
5. A report filed by the trustees of a corporation which states that the capital was paid in full, is not a "false report," because of the mere fact that property for which it was issued has decreased in value.—*Id.*
6. Trustees of a corporation who have filed a false report are not liable for debt of the corporation theretofore contracted. (§§ 460 and 463, Fifth Division of the Compiled Statutes, being § 445 of the Civil Code construed.) *Id.*
7. The president of a corporation organized to acquire townsites and erect buildings, has no implied authority to act as its managing agent and bind the company by a contract with an architect for building plans.—*Mathas v. White Sulphur Springs Association*, 359.
8. In this case, the evidence did not show that the president was in the active conduct and management of the business of the company, or that he had full control of its business, or was its principal stockholder, or that he had express authority to contract for the plans or buildings to be erected by the company without the sanction of the board of directors, or that he had general authority to act for the board, or that it was his custom to exercise publicly such powers, or that the company led the public to believe that he had such powers or knew of the contract sued upon; and it was *held* that the mere fact that the president had had repairs done by plaintiff to a building belonging to the company, was not sufficient to justify a finding that he had power to bind the company by the contract sued upon.—*Id.*
9. An action will not lie to compel a corporation to transfer stock to plaintiff, when it appears that, prior to the purchase of the stock by him, an attachment was levied upon the stock belonging to his vendor.—*Matusevitz v. Citizens District Messenger & Burglar-Alarm Telegraph Co.*, 368.
10. A corporation organized to carry on hardware business has power to buy claims against third parties indebted to it, when such purchases are made in good faith and for the protection of its own claims.—*Mahoney v. Butte Hardware Co.*, 377.
11. Where it appears that the manager of a corporation has bought other claims against third parties indebted to it, and that it has brought suit for the collection of the claim of plaintiff against such third parties purchased by such manager, a verdict will not be set aside on the ground that the authority of the manager was not shown.—*Id.*

12. Where an agent's authority to purchase such claims is at issue, it is error to refuse to admit in evidence the articles of incorporation of the company.—*Id.*

COSTS.

See APPEALS, 28, 29—ATTORNEY AND CLIENT.

COUNTIES.

See CONSTITUTION, 5, 6, 7.

COUNTY COMMISSIONERS.

See SALES OF PERSONAL PROPERTY.

COURTS.

JURISDICTION.

COVENANTS.

The United States is a "person" included in the terms of a covenant against "all and every person or persons whomsoever lawfully claiming or to claim the same."—*Giddings v. Hulter*, 263.

CROSS-EXAMINATION.

See EVIDENCE.

DAMAGES.

See INSTRUCTIONS, 7—PUBLIC ROADS.

Defendant offered to prove that plaintiff by an expenditure of \$100 could have entirely avoided or materially decreased the damages caused by defendant's act; and also requested certain instructions on this theory of the law. *Held*, it was error to refuse the evidence and instructions; *Held*, also, that such refusal is not justified by an argument of counsel for respondent, to the effect that plaintiff could not have avoided the damages—it was for the jury to say from the evidence whether or not this could have been done.—*Sweeney v. Montana Central Railway Co.*, 163.

DEATH.

Proof of, see EXECUTORS AND ADMINISTRATORS.

Presumption of, see EXECUTORS AND ADMINISTRATORS.

DEEDS.

See DOWER—WATER RIGHTS.

DEEDS OF TRUSTS.

When are assignments, see ASSIGNMENTS FOR BENEFIT OF CREDITORS.

DEFAULT.

Opening of, see PRACTICE (Civil) 4, 5—JUDGMENTS.

DELIVERY.

See SALES OF PERSONAL PROPERTY—ASSIGNMENT FOR BENEFIT OF CREDITORS.

The evidence introduced by plaintiff tended to prove that, on July 29th, 1892, the Stock Growers' National Bank of Miles City, being insolvent, suspended business:

that B, the cashier, was the only officer, and M was the only director of the Bank present at the time; that B, being a debtor to the bank, upon the advice of M, by a written instrument reciting a consideration of one dollar, "sold and assigned" to the bank a certain frame building situated on what is known as the right of way in the town of Red Lodge, which is several hundred miles distant from Miles City, "said building being occupied at present by H. J. Armstrong & Co.;" and there was also included a horse and other personal property; the instrument was witnessed by M, and B then in his presence and still acting under his advice deposited the paper in the vault of the bank; that B then notified the bank's bookkeeper of what he had done, and directed him to communicate the same to the person who should take charge of the bank; that on August 8th, before the levy of attachment, B notified Armstrong & Co. in writing, of the transfer, and directed that firm to pay to the receiver of the bank all rents due or to grow due upon the written lease under which they were in possession of the building; that when the levy was made, the clerk in charge of the store told the sheriff of this notice. There was no question of actual fraud, but defendant claimed, in his motion for non-suit, that the transfer was fraudulent as to creditors. *Held*, that under the facts stated there was some evidence tending to show an acceptance of the bill of sale by the bank. *Held*, also, that there was some evidence tending to show a delivery, and that it was error, under these circumstances, to grant a motion for a non-suit. — *State ex rel. v. Conrow*, 104.

DEMAND.

See PLEADINGS, 13.

DEMURRER.

See PLEADINGS—Answer after demurrer overruled, see APPEALS, 22.

DEPOSITION.

See APPEALS, 18.

DESCRIPTION.

See EVIDENCE.

DIRECTORS.

See CORPORATIONS.

DISCRETION.

See INJUNCTIONS.

DOWER.

See STATUTE OF LIMITATIONS, 1.

1. An action by a widow to recover a dower right and for the value of rents and profits, does not abate upon her death, but survives to her legal representatives, under section 23 of the Code of Civil Procedure (1887) providing that an action shall not abate by the death of a party, but shall survive and be maintained by his representatives or successors in interest. — *Lynde v. Wakefield*, 23.
2. A sheriff's deed to lands sold under a judgment against the husband conveys to the purchaser only the title of the husband and not the wife's inchoate right of dower. — *Id.*
3. A quit-claim deed executed by a judgment debtor after the sale of his lands under an execution conveys merely the right of redemption and does not affect the wife's right of dower. — *Id.*

ELECTIONS.

1. Section 1261 of the Political Code, provides that if a voter "shall desire to vote a straight party ticket, he may do so by making a cross at the head of the list representing his party ticket. If he shall desire to vote for any candidate or candidates on any other list, he shall make a cross opposite the name of every candidate for whom he desires to vote;" and section 1403 provides that "if part of a ballot is sufficiently plain to gather therefrom the elector's intention, it is the duty of the judges of election to count such part." *Held*, that where a ballot is marked with a cross at the head of a party list, which contains no candidate for a certain office, and is marked with a cross opposite the name of a candidate for that office under another list, the ballot should be counted for all candidates under the party list and for the candidate so marked.—*Dickerman v. Gelsthorpe*, 249.
2. Where a ballot is marked with a cross at the head of a party list, and a cross is marked opposite the name or names of one or more but not all of the candidates under that list, and no other marks are made, the ballot should be counted for all candidates under the list.—*Id.*
3. "D" and "G" were candidates for the same office; eight ballots were marked with a cross at the head of the list containing "D's" name; on the same ballots a cross was marked opposite the names of certain candidates other than "G" under another list. *Held*, that these ballots should have been counted for "D."—*Id.*
4. If the eight ballots above referred to had also been marked with a cross opposite "G's" name, then they should not be counted either for "G" or "D."—*Id.*
5. In this state a person claiming to have been elected to an office, may bring a proceeding under section 2010 in the nature of *quo warranto*, although section 1414 same code gives another remedy for a trial of the same question.—*State ex rel. Brooks v. Fransham*, 373.
6. Where a political party is regularly organized and has a party name, candidates nominated by petition of electors belonging to that party are not entitled to be placed on the ballot under the name of that party; party nominations cannot be made by petition.—*Id.*
7. Under section 1351, 1354 and 1356 of the Political Code, the ballots are prepared and provided by the respective county clerks; and it is the duty of the clerk to publish in one or more newspapers the nominations, at least ten days before the election (Section 1312, Political Code); *held*, that the object of this publication is to afford opportunity to correct errors and omissions before elections. (§ 1322 of the Political Code).—*Id.*
8. *Held*, accordingly, that unless the corrections are made before the election, the ballots cannot be rejected because the nominations were not properly made.
9. The fact that the district judge of the county was also a candidate for re-election and thus disqualified, does not change the rule; application could be made to any other district judge.—*Id.*
10. The laws of this state permit an elector to vote a straight party ticket by marking a cross at the head of his party, or he may mark a cross opposite the name of every candidate on the list; if he desires to vote for a candidate or candidates on another list, then he must make a cross opposite the name for every candidate for whom he desires to vote. *Held*, that where there are two candidates for the same office, ballots which are marked with the cross at the head of the list containing the name of one of the candidates, and with a cross opposite the name of the other, cannot be counted for either, as it is impossible to ascertain the intent of the voter.—*Id.*

EMINENT DOMAIN.

See PUBLIC ROADS.

1. Section 15, article 3 of the constitution, provides that "the use of all waters that are now appropriated or may hereafter be appropriated, for sale, rental, distribution or other beneficial use, and the right of way over the lands of others for all ditches — necessarily used therewith shall be held to be a public use." *Held*, that the phrase "other beneficial use" includes other uses than such as are kindred to rental, sale or distribution.—*Ellinghouse v. Taylor*, 462.

2. The use of water to cultivate a particular tract of land, is a public use, under section 15, article 2 of the constitution.—*Id.*
3. The law of March 6, 1891, which authorizes a proceeding to condemn a right of way over the lands of another for a ditch to be used for irrigating purposes, is not unconstitutional.—*Id.*
4. The mere fact that plaintiffs had been trespassers upon defendant's land, does not deprive them of the right to condemn a right of way for a public use. *Id.*

ENDORSEE.

See NEGOTIABLE INSTRUMENTS.

EQUITY.

See ATTACHMENTS, FRAUDULENT CONVEYANCES—TRUSTS.

In a suit in equity, the court can set aside the verdict or findings of the jury, and adopt findings of its own.—*O'Rourke v. Butte Lodge, etc., 541.*

EQUITABLE JURISDICTION.

See ASSIGNMENT FOR BENEFIT OF CREDITORS—FRAUDULENT CONVEYANCES—TRUSTS.

ERROR.

IMMATERIAL ERROR—See APPEALS 21.

ESCROW.

SALES OF CONTRACTS, 1, 2.

ESTOPPEL.

See SALES OF PERSONAL PROPERTY, 2.

Where plaintiff sues to recover the reasonable value of the use of premises, and proves a written lease and an oral modification thereof, he is estopped from objecting to evidence proving the modification of the lease by way of reduction of rent.—*Maul v. Schultz, 385.*

EVIDENCE.

See APPEALS 21 FOR IMMATERIAL ERROR—ATTORNEY AND CLIENT—CONFLICT IN, see APPEALS—EQUITY, NEW TRIALS—See also ESTOPPEL, JUDGMENTS—PRACTICE—SUMMONS—WATER RIGHTS.

1. Where the only evidence in the record shows that the amount of the appropriation of water was from 50 to 60 inches, a finding fixing the amount at 150 inches is not sustained by the evidence.—*McDonald v. Lannon, 78.*
2. In an action upon an accident insurance policy, the burden is upon the defendant to prove contributory negligence, (citing *Higley v. Gilmor, 8 Montana 90; Wall v. Railway Company, 12 Montana 44, 29 Pac. 721; Nelson v. City of Helena, 16 Montana, 21, 38 Pac. 995*); this rule is not changed by an allegation in the complaint that deceased, at the time he was injured, was using due diligence for his personal safety.—*Mulville, Adm. v. P. M. S. Ins. Co., 88.*
3. In such an action, held that evidence tending to show a practice of deceased of jumping on moving trains was properly excluded.—*Id.*
4. Evidence having been introduced by defendant showing that the wounded man had been found between the tracks; held, that evidence as to the space between the cars and the track was properly admitted in rebuttal, as it tended to contradict defendant's testimony; held, also that plaintiff has the right to introduce in rebuttal testimony on the issue of contributory negligence.—*Id.*

5. Plaintiff in rebuttal in order to contradict a witness of defendant offered in evidence the testimony of such witness taken at the coroner's inquest and signed and sworn to by him; to this defendant objected because it did not appear that all the testimony of the witness was taken down at that time; *held*, 1st, That the objection was properly overruled; 2nd, That in the absence of anything to the contrary, it would be presumed that all the evidence was taken down.—*Id.*
6. *Held*, there being no evidence to the contrary, it will be presumed that the public administrator and the court acted honestly and carefully in such a compromise; *Held*, also that it will be presumed that, before making an order allowing a compromise, the court was informed of the necessity for the same and the terms thereof.—*Id.*
7. It was proper to sustain objection to questions upon cross-examination of plaintiff's witnesses asked for the purpose of proving the affirmative defense set up in the answer.—*Davis v. Morgan*, 141.
8. A witness cannot give his opinion as to whether the father or mother is the more suitable custodian of their minor child.—*State ex rel, Giroux v. Giroux*, 149.
9. The trespass complained of was the digging of a new channel, which changed the natural course of a stream which ran through plaintiff's land. The trespass was not continuous in its nature, this was admitted by plaintiff. Evidence was admitted tending to prove the difference in the market value of the land before and after the trespass. Subsequently plaintiff introduced evidence of the result of the stream overflowing the new channel subsequent to the original trespass. *Held*, that this evidence was properly admitted for the purpose of showing the difference in the market value of the premises before and after the trespass.—*Sweeney v. Mont. C. Ry. Co.*, 163.
10. In an action for conversion, the answer admitted that plaintiff had been the owner, and then alleged title in defendants by conveyance from vendee of plaintiff; at the trial, defendants offered evidence tending to show plaintiff's declaration that he had sold the property. *Held*, that, it appearing that plaintiff had been the owner of the property, the presumption was that he continued to remain so; that as the declarations admitted in evidence tended to show a sale by plaintiff, it was error to refuse in rebuttal evidence tending to show statements made by defendant's vendor to their agent prior to and at the time of the alleged sale; them, that he was not the owner of the property.—*Laubenheimer v. Bach, Cory & Co.*, 177.
11. A witness for plaintiff testified that one of defendant's witnesses said to him "do you want to make three dollars; there is a subpoena, and there is three dollars in it; go and see Murray's (defendant's) lawyer, and get subpoenaed and there is three dollars in it." *Held*, that the testimony was immaterial and was properly stricken out.—*Reardon v. Patterson*, 231.
12. Where an attorney sues for services rendered in an action, it is not error to allow an expert to answer a hypothetical question which does not include the result of the litigation; for although that is a fact which the jury may consider, it may be brought out upon cross-examination of the witness.—*Morrill v. Herschfeld*, 245.
13. In an action to recover a horse, which defendant claimed to have bought from "H." the bill of sale to "H." containing a description of the horse is hearsay evidence as to defendant and upon his objection was properly excluded.—*McIntire v. McCabe*, 253.
14. The facts given in evidence must prevail over the conclusion which the witnesses incorrectly draw from the facts; the conclusion is more of a question of law.—*Casey v. Thielege*, 241.
15. Accordingly, where the facts in evidence are merely that the witnesses had found, prior to the application for the placer patent, streaks of quartz, croppings that indicated the existence of leads and, under these croppings, veins between granite walls and, in their opinion, carrying silver, the location of a mining claim on one of these veins and partly within the placer claim, and the abandonment of the same because of the expense of working it—and where no assay or other means had been tried to determine whether or not the vein carried any ore of marketable value—*Held*, that the evidence did not justify the finding of the jury that the "veins" were "known veins or lode" within the meaning of section 233.—*Id.*
16. It is error to refuse to admit cross-examination of a witness on an immaterial mat-

- ter testified to by him, when an instruction is subsequently given on the theory that such testimony was competent and material.—*Mahoney v. Butte Hardware Co.*, 377.
17. Where, to show the authority of an agent to buy plaintiff's claim against third persons, prior purchases of claims by him are admitted in evidence, it is error to refuse to admit in evidence judgment-rolls in suits showing that such claims entitled the holders thereof to a specific lien on property, as such evidence might tend to show that the manager's authority was confined to the purchase of similar claims.—*Id.*
 18. In an action by the endorsee of a check against the maker and the payee, the answer alleged that the check was obtained without consideration and by false and fraudulent practices, and transferred to plaintiff without consideration and for the purpose of defeating the defendant's defense; on direct examination plaintiff testified that he had had some business transaction with "L," the payee of the note; on cross-examination the witness was asked if he had not gambled in his own saloon and won several hundred dollars from the payee. *Held*, error to sustain an objection to the question on the ground that it was immaterial.—*Harrington v. B. & B. M. Co.*, 411.
 19. In such an action, the declaration of the payee of the note, made a few hours after his transfer of the same, and stating that he had obtained it by gambling, and that he endorsed it so that the money could be obtained on it for him, is admissible in evidence, although not made in the presence of the endorsee, as it is part of the *res gestae* and tends to show a conspiracy.—*Id.*
 20. In an action of ejectment, the burden is upon the defendant to establish his claim of adverse possession.—*Jennings v. Gorman*, 545.
 21. In such an action, where defendant has introduced evidence tending to show his adverse possession, plaintiff is entitled to introduce evidence in rebuttal tending to show the contrary.—*Id.*
 22. In an action for conversion, where the title of the plaintiff is attacked for fraud, he may be rigidly cross-examined as to the bona fides of his title.—*Pincus v. Reynolds*, 564.
 23. Where the plaintiff is a party to a conspiracy to defraud creditors, the declarations of his co-conspirator, although made in his absence, are admissible in evidence.—*Id.*

EXECUTIONS.

See JUDGMENTS—For wrongful levy, see SHERIFF.

1. Entry on Indian lands by an officer to levy an execution issued by a state court on property of one not an Indian, but residing on the Indian land by consent of the tribe, is not interdicted by the provision of the enabling act of Montana that all Indian lands in the state "shall remain under the absolute jurisdiction and control of the congress of the United States."—*Stiff v. McLaughlin*, 800.
2. One not an Indian acquires no tribal relations by marriage with an Indian woman and residence on a reservation.—*Id.*
3. The provisions of article 2 of the treaty of 1855 with the Flathead Indians, that there might be placed on their reservation "other friendly bands of Indians of the territory of Washington," who might agree to be consolidated with the Flathead Nation, does not authorize the adoption into the tribe of a quarter-breed Chippewa, who is married to a Flathead woman.—*Id.*
4. The fact that a man is permitted by the United States authorities to reside on a reservation with his Indian wife does not raise a presumption that the government intended he should acquire the status of a tribal Indian.—*Id.*
5. A refusal of an Indian agent to consent to entry by a sheriff on the reservation to levy execution on the property of one not an Indian does not excuse the sheriff from making the levy.—*Id.*
6. Advice of a United States district attorney that the sheriff had no right to enter the reservation without the agent's consent does not excuse the sheriff from making the levy.—*Id.*

EXECUTORS AND ADMINISTRATORS.

See PLEADINGS—EVIDENCE, 6.

1. *Held* that an order of the court authorizing an administrator to settle a claim be-

longing to the estate to the best possible advantage was not invalid under section 222, Probate Practice Act, Compiled Statutes 1887, section 2737, Code of Civil Procedure, 1895. The court having first determined the necessity for a compromise may authorize the administrator to settle a claim "to the best advantage possible."—*Mukelle, Administrator, v. Pacific Mutual Life Insurance Co.*, 95.

2. The public administrator has the same power to compromise claims as an administrator or executor has. (§ 350 Probate Practice Act, Compiled Statutes, 1887, §4522, Political Code, 1895, construed.)—*Id.*
3. In application for letters of administration where there is no contest, affidavits of non-resident witnesses, taken before a notary public, may be used to prove death, although no commission was issued and no notice was given that the testimony of such witnesses would be taken.—*In re Litter's Estate*, 474.
4. The district judge, if he is not satisfied with the proof thus offered, has the power to order further testimony.—*Id.*
5. The law presumes the death of a person who is shown to have departed from her home more than 14 years prior to application for letters of administration, and has never returned, and who has never been heard of by her mother and sisters for more than 14 years, although they made diligent search in the attempt to find her.—*Id.*

FEEB.

Of Sheriff, see FORECLOSURE, 1—ATTORNEY AND CLIENT, 2.

FELLOW SERVANTS.

See MASTER AND SERVANT.

FENCES.

See CONSTITUTION, 4—On homesteads, see MORTGAGE.

FINDINGS.

See APPEALS, 9, 10, '4—EQUITY—EVIDENCE.

FIXTURES.

On homestead, see MORTGAGES.

FORECLOSURE.

See HOMESTEAD—PLEADING, 14.

Under section 4634 of the Political Code, a sheriff is entitled to his commission on the purchase price of real estate sold by him under an order of sale in a suit of foreclosure when the mortgagee buys in the premises.—*Jurgens v. Hauser*, 184.

FOREIGN JUDGMENT.

See JUDGMENTS, 5.

FORFEITURE.

Of bail bond, see BAIL.

FORMER ACQUITTAL.

See APPEALS, 1—PRACTICE (Criminal).

FRAUD.

See CORPORATIONS—EVIDENCE—INSTRUCTIONS—FRAUDULENT CONVEYANCES.

FRAUDULENT CONVEYANCES.

See ASSIGNMENT FOR BENEFIT OF CREDITORS—CORPORATIONS, 2—DELIVERY—EVIDENCE—INSTRUCTIONS—PLEADINGS.

1. Under the preemption law defendant Ferdinand Wassweller obtained patent to 160 acres of land, one-half of which he sold in 1878 for \$10,000, of which one-half was paid to him at once, and the other half was subsequently paid to the wife, who in September, 1883, turned it over to her husband; from defendants' testimony it further appears that they had an agreement between themselves that she was to have one-half of the purchase price of the land whenever the same was sold, and one-half of the profits of the business which they conducted on the premises. It further appears from defendants' testimony that, when Mrs. Wassweller paid to her husband the money above mentioned, it was agreed between them that he should use the money in improvements upon the half of the premises not sold, and that he should, upon demand, convey to her that half of the real estate for her own separate use, which he did in June, 1892, by a deed to one "T" who thereupon conveyed the premises to the wife. In 1887 the defendant Ferdinand Wassweller gave to plaintiff his promissory note in payment of material, a part of all of which he had used in improvements on the premises subsequently conveyed to the wife, the title of the premises being in the husband of record and remaining in his name until June, 1892. *Held*, that by reason of the negligence and laches of the wife in allowing the title to stand in her husband's name and in allowing him so to use the same and hold the title thereto as to induce others to believe that he owned the property, she could not in equity claim the premises freed from the lien of plaintiff's judgment.—*Holler v. Wassweller*, 169.
2. A judgment, which is obtained upon notes known by the holder thereof to have been made for the purpose of defrauding creditors, is void as to creditors.—*Pincus v. Reynolds*, 584.
3. Where a judgment is void as to creditors, and the plaintiff in the action is the purchaser at the execution sale, his title is void as to an attacking creditor.—*Id.*
4. Although such creditor extended credit after he knew of the sale, he may attack the same for such a demand when he ascertains that the sale was fraudulent.—*Id.*

GAMBLING.

See PRACTICE (Criminal) 3, 4.

GARNISHMENT.

For effect of, see ATTACHMENT.

HABEAS CORPUS.

1. A proceeding in *habeas corpus* is summary, and unsubstantially technical rules of evidence should not control.—*State ex rel. Giroux v. Giroux*, 149.
2. At common law where the father and mother are equally fitted for the care of their child, the right of the father is superior.—*Id.*

HEAD OF FAMILY.

See HUSBAND AND WIFE.

HOMESTEAD.

See MORTGAGES.

HUSBAND AND WIFE.

See FRAUDULENT CONVEYANCES—HABEAS CORPUS—MORTGAGES.

1. An agreement between husband and wife providing for a separation, and adjustment of their respective interests in property and for the future support and maintenance of the wife, is valid only when it is to take effect at once and is immediately

complied with, and when the marital relations are of such a character as to render a separation necessary for the health or happiness of one or the other; mere willingness to live apart is not enough, neither will the agreement be enforced when it is the result of mutual caprice or reckless disregard of marital obligations; neither will such an agreement be enforced when it is to be used as a means to facilitate a divorce.—*Stebbins v. Morris*, 115.

2. *Held*, accordingly, a demurrer to the complaint was properly sustained, where the complaint alleges the agreement to live apart, the mutual obligations thereunder and the breach of the contract by the husband, but neither the agreement nor the complaint contains any statement of facts showing the necessity or cause for such separation.—*Id.*
3. A husband who lives with his family is the "head of the family," and this relation cannot be destroyed by his failure to support his wife and children, or by the mere fact that he quarrels with his wife and occupies a different bed.—*Barry v. Western Assurance Co.*, 571.

INDIAN RESERVATIONS.

See EXECUTIONS.

INFORMATION.

See PRACTICE (Criminal)

INJUNCTIONS.

Action on injunction bond, see PARTIES—see also JURISDICTION—PLEADINGS.

Although the granting of a temporary injunction is a matter of discretion, still that discretion must be sound, and is subject to review; and where it appears from all the facts that the order was improperly granted, it may be reversed on appeal.—*Schilling v. Reagan*, 508.

INSTRUCTIONS.

See APPEALS—MASTER AND SERVANT—PLEADINGS 2.

1. Error of the court in refusing to instruct the jury to acquit the defendant for insufficiency of the evidence to warrant a conviction will not be considered, where the record does not properly present the evidence.—*State v. Gawith*, 48.
2. The policy of insurance provided that it should not include a case where the insured sustained injuries or was killed while violating the rules of any company or corporation; no evidence was offered of any rule which deceased violated; *held*, that an instruction to the effect that if the deceased received the injuries causing his death while violating a rule of any company, defendant was not liable, was properly refused.—*Mulville, Adm. v. Pac. M. L. Ins. Co.*, 25.
3. An instruction to the effect that the plaintiff could not recover if the deceased, by any negligence on his part, caused his death, is too sweeping in its terms and was properly refused.—*Id.*
4. Instructions must be considered as a whole; and where instructions are given which contain the correct rule, the verdict should not be reversed because another instruction does not give the law on that subject in full.—*Mulligan v. Mont. Union Ry. Co.*, 125.
5. There is no error in charging the jury in such a case, that plaintiff could not recover if his own negligence directly contributed to his injury.—*Id.*
Nor was it error to charge the jury that plaintiff could not recover, for an injury caused by a fellow servant.—*Id.*
6. The defendant, a constable, justified under an execution against plaintiff's grantor, alleging that the sale was a conspiracy to defraud the creditors of the vendor, to which plaintiff was a party; evidence tending to sustain this defense was introduced. *Held*, that it was error to refuse a request for an instruction that "if the jury believe from the testimony that the sale * * * was not made in good faith, but was made

for the purpose of hindering and defrauding the creditors of Mrs. Meyers, then your verdict should be for the defendant;" and this error is not cured by a charge to the jury concerning ownership, but which does not refer to the *bona fides* of the sale.—*Dav v. Morgan*, 141.

7. The court charged the jury in instruction No. 5 that the measure of damage was the difference in the market value before and after the trespass; and in instruction No. 9 the court charged the jury that in estimating the damages they might consider the evidence of the overflowing of the stream above referred to, and refused defendant's request to charge that plaintiff could not recover damages for such overflowing. *Held*, that it was error not to limit the effect of the evidence above referred to as requested by defendant, and that instruction No. 9 was misleading in the absence of such limitation.—*Sweeney v. Montana Central Ry. Co.* 183.
8. Under the former practice, instructions were not a part of the judgment roll, and could not be considered on an appeal from the judgment unless included in a bill of exceptions.—*Sanderson v. Billings Water Co.*, 236.
9. In an action to recover the chattels, in which the evidence established a conditional sale, *held*, it was error to charge the jury in the language of the statute concerning fraudulent conveyances; because the instruction was not applicable and was misleading.—*Goodkind v. Gilliam*, 385.
10. In an action upon a check by an endorsee against the maker, in which the answer alleges that the plaintiff is not a purchaser in good faith and that the check was procured by fraud in which the plaintiff participated, an instruction to the effect that it is admitted that the check was "duly endorsed" by the payee, is misleading, as the jury might infer that the check was endorsed in a lawful manner.—*Harrington v. B. & B. M. Co.*, 411.
11. In such an action, where there is evidence tending to show that plaintiff had reason to suspect that the check was improperly obtained, an instruction which confines the jury to the question of plaintiff's actual knowledge of fraud, is improper.—*Id.*
12. Where the "intent" is not made a part of the definition of the crime of assault and battery in the second degree, it is not error to refuse the request to instruct the jury that the assault must have been made "with the intent to inflict grievous bodily injury."—*State v. Broadbent*, 467.
13. Where the instructions given by the court are correct, the verdict will not be disturbed because the instructions are not full enough, unless the court, upon request, refused to instruct more fully.—*Id.*
14. In an action of replevin, defendant sheriff justified under a writ, and claimed that the property sued for had been transferred to plaintiff by her husband, the defendant named in the writ, in fraud of his creditors. Evidence was introduced showing that some of the property was transferred to the plaintiff by her husband; and that she had bought the rest from other persons. *Held*, it was error for the court in instructing the jury to assume the fact that plaintiff acquired title to all of the property through her husband.—*Collier v. Fitzpatrick*, 562.

INSURANCE.

See INSTRUCTIONS, 2-3.

INTEREST.

Where a judgment for the defendant in a suit on a bond was reversed on appeal, the plaintiff, upon recovering a judgment on the second trial is not entitled to interest upon his claim from the date of the judgment rendered at the former trial, under section 1237, Fifth Division, Compiled Statutes, allowing interest in such cases after ascertaining the balance due, since the balance due was not ascertained until the verdict was rendered at the second trial.—*Priest v. Eide*, 53.

INTERPRETATION.

See CONTRACTS.

JEOPARDY.

See APPEALS 1—PRACTICE (Criminal) 1.

JUDGMENTS.

* Actions on, see STATUTE OF LIMITATIONS, 2, 3—See also FRAUDULENT CONVEYANCES.
2—MECHANICS' LIENS—Vacating of, see PRACTICE.

1. In a mechanic's lien foreclosure where one of the defendants relied upon a judgment lien as prior to the plaintiff's lien and an execution had been issued on motion after five years from entry of his judgment, it was error to exclude the judgment roll, execution, motion papers and sheriff's deed on the ground that the said defendant was not the owner of the judgment at the time the motion for execution was made, since as the judgment debtor had raised no objection to the issuance of the execution and as it had been issued in the name of the party in whose favor it was rendered, the ownership of the judgment was of no concern to the plaintiff.—*Johnson v. Puritan Mining Co.*, 30.
2. M sued C and H; H retained an attorney to defend himself and C; a demurrer to the complaint was filed in behalf of both defendants, and C was informed and believed that the attorney would conduct his defense, which was the same as that of H; and that no further step would be necessary until April 1st. Demurrer was overruled and an answer filed in behalf of H only, which showed a good defense as to himself and C also; no replication having been filed (as required at that time), H moved for judgment on the pleadings; the plaintiff then (in March) dismissed the action as to H and took judgment by default against C. Held, that C's motion to set aside default, based upon an affidavit setting forth the above facts and accompanied by an answer showing a meritorious defense and similar to the answer of H, should have been granted.—*Morse v. Callantine*, 87.
3. That such motions are addressed to the sound discretion of the court, and that the order denying the motion was an abuse of discretion and accordingly reversible by this court.—*Id.*
4. In an action to foreclose a mechanic's lien, summons was served by publication; held, that a personal judgment could not be entered against the defendant so served. (§ 1383, Fifth Division of the Compiled Statutes, 1887.)—*Richards v. Lewisohn*, 128.
5. A judgment of a sister state can be attacked for want of jurisdiction of the person of the defendant; but where such judgment is obtained upon personal service of summons within the jurisdiction of the court, it cannot be attacked collaterally for fraud, and the fact that defendant was not within the jurisdiction of the court, at the time the decree was entered, does not change the rule.—*State ex rel. Giroux v. Giroux*, 149.
6. Under section 307, Code of Civil Procedure, Compiled Statutes 1887, a judgment is not a lien upon the real estate of judgment debtor, until it is entered on the judgment docket.—*Sklower v. Abbott*, 228.
7. The lien of an attachment upon real estate is prior to the lien of a judgment obtained prior thereto, but not docketed until after the levy of the attachment.—*Id.*
8. It will not be assumed that in entering judgment by default the court below did not comply with the law.—*Butte Butchering Co. v. Clarke*, 306.
9. Where defendant has appeared generally by demurrer, a judgment will not be reversed for a defect in the summons.—*Id.*
10. A defendant in an action in a justice's court who appears generally in a motion to set aside a default alleged to have been improperly taken, and who, upon denial of the motion, appeals to the district court, where the appeal is dismissed, thereby waives any irregularity in the summons, and cannot maintain a suit to set aside the judgment on account of such irregularity.—*Schilling v. Reagan*, 508.
11. An action to vacate a judgment will not be sustained, when based upon grounds which could have been litigated in the former action.—*Id.*
12. For the reason stated, an action will not lie to set aside a judgment obtained by a foreign corporation, because it has not complied with the state law regulating the

right of such corporations to contract, etc., in this state, as this question could have been raised in the action in which the judgment was obtained.—*Id.*

JUDGMENT ROLL.

Under the former practice, instructions were not a part of the judgment roll, and cannot be considered on an appeal from the judgment roll unless included in a bill of exceptions.—*Sanderson v. Billings Water Co.*, 236.

JURISDICTION.

See EQUITY—EQUITABLE JURISDICTION—JUDGMENTS.

A state court has jurisdiction of an action on an injunction bond given in a suit brought in a federal court.—*Montana Mining Co. v. St. Louis Mining and Milling Co.*, 313.

LACHES.

See NEGOTIABLE INSTRUMENTS, 2—FRAUDULENT CONVEYANCES, 1.

LAW OF THE CASE.

See RES ADJUDICATA.

LAWS.

Title of, see CONSTITUTION, 9.

LEASES.

Plaintiff sought to recover for the reasonable value of the use of premises; defendant pleaded a written lease and modification thereof; in the replication, plaintiff denied the modification and alleged the annulment of the lease. *Held*, that upon the evidence, it appears that the lease was modified and not annulled.—*Maul v. Schultz*, 335.

LIENS.

See ATTACHMENTS—JUDGMENTS—MECHANICS' LIENS—For equitable lien, see TRUSTS.

LIMITATION OF ACTIONS.

See STATUTE OF LIMITATIONS.

MANDAMUS.

1. The laws of Montana provide for the examination of all persons desiring to practice medicine,—the examination to be held before the medical examiners. It is further provided that where a certificate is refused, the person aggrieved may appeal to the district court, and that such appeals shall be conducted as appeals from a decision of a board of county commissioners, which, it is further provided, "are prosecuted and tried like appeals from a justice of the peace." The law also provides that appeals from a justice's court are tried *de novo*. *Held*, that an applicant who has been refused a certificate, has a right to appeal to the district court, and on such appeal is entitled to a trial *de novo*.—*State ex rel v. District Court*, 501.
2. Code of Civil Procedure 1895, section 1961, provides that mandamus may issue to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station; and section 1962 provides that the writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. *Held*, that mandamus was the proper remedy to compel a city to levy

a special tax to pay ascertained water rentals due under a valid contract for a water supply, which contract the city had repudiated.—*State ex rel. v. The Great Falls Water Works*, 518.

3. The city could not dispute its records as to the number of hydrants for which rentals were due under the contract, in the absence of an averment in the return laying a foundation therefor.—*Id.*
4. In the absence of an averment in the return to support its admission, evidence that the water company had no license to carry on its business was also properly excluded.—*Id.*
5. Where a city repudiates a contract with a water company providing for payment of hydrant rentals semi-annually, but still uses the water furnished by the company, and insists that the supply be continued regardless of the contract, a command in a writ of mandamus, that the city levy sufficient taxes to pay, not only the six months' water rentals already due, but also those that will become due for the remaining six months of the year, is proper.—*Id.*

MARRIED WOMEN.

See ACKNOWLEDGMENTS—HUSBAND AND WIFE.

MASTER AND SERVANTS.

The engineer of a locomotive and the fireman are fellow servants, and it was not error to charge that the latter could not recover from the company for an injury caused by the negligence of the former.—*Mullville, Adm. v. Montana Union Ry. Co.*, 136.

MAYOR.

See MUNICIPAL CORPORATIONS.

MECHANICS' LIENS.

See PLEADINGS 27.

1. Under section 1874, Fifth Division of the Compiled Statutes extending a lien for labor and materials to the land upon which the building or improvement is situated and giving it precedence over any mortgage made subsequent to the commencement of the work, and section 1876, *Id.*, providing that the lien shall attach to the improvement in preference to any prior mortgage on the land and permitting the enforcement of the lien by the sale of the improvement under execution and its removal within a reasonable time, the lien of a mechanic as to the improvement is superior to a prior mortgage on the land, but as to the land itself the prior mortgage maintains precedence, and therefore, where a lien claimant has not erected a building or placed such improvement upon a mining claim, as is susceptible of severance or removal, his lien must yield to a prior mortgage upon the premises.—*Johnson v. Puritan Mining Co.*, 30.
2. In an action to foreclose a mechanic's lien, a personal judgment cannot be entered against a defendant upon whom service of summons was had by publication only.—*Richards v. Lewisohn*, 128.
3. The notice of lien filed by plaintiff, as well as the account, described the person for whom the labor and material were furnished and the owner of the building as "Lewisohn (whose christian name is unknown)." The action is brought against Lewisohn Bros. who are alleged to be owners. *Held*, that the notice and claim were sufficient.—*Richards v. Lewisohn Bros.*, 128.
4. It seems that, where the name of the owner of the building is known, it should be given in full. (§§ 1871, 1872, 1873 of the Compiled Statutes, 1887, construed.)
5. A sub-contractor is entitled to a judgment for a lien against the building for materials furnished by him, although summons was served by publication against the principal contractor, against whom no personal judgment could be obtained.—*O'Rourke v. Butte Lodge, etc.*, 541.

MEDICAL BOARD.

See MANDAMUS.

MINES.

See CORPORATIONS—PLEADINGS, 29—MECHANICS' LIENS, 1.

1. The expression "known veins or lodes" used in section 2333, United States Revised Statutes, includes such veins only as are clearly ascertained and of such a character as to render the land more valuable on that account and to justify exploitation. *Casey v. Thieviege*, 341.
2. One who claims a quartz lode mining claim which is included in the boundaries of a patented placer claim, has the burden of proving that the vein was a "known vein" when application was made for the placer patent.—*Id.*
3. Where the facts in evidence are merely to the effect that, prior to the application for the placer patent, the witnesses had found streaks of quartz, croppings that indicated the existence of leads and, under these croppings, veins between granite walls which, in their opinion, carried silver, the location of a quartz claim on one of these veins and the abandonment of the same—and where the evidence further showed that no assay had been made to determine whether or not the vein contained any marketable ore. *Held*, that the evidence did not justify the finding of the jury that the veins were "known veins or lodes" within the meaning of section 2333, United States Statutes.

MODIFICATION.

Of lease, see LEASE.

MONOPOLY.

See MUNICIPAL CORPORATIONS.

MORTGAGES.

See FORECLOSURE—MECHANICS' LIENS—NEGOTIABLE INSTRUMENTS—PLEADING.

1. Under section 323, First Division of the Compiled Statutes 1887, a mortgage of a homestead was void unless executed by the husband and wife, and the acknowledgment was an essential part of the execution by the wife.—*American Savings & Loan Association v. Burghardt*, 323.
2. Under the same law, a certificate of acknowledgment of the execution of a mortgage by a married woman, which fails to state that the acknowledgment was made "on examination apart from and without the hearing of her husband," is absolutely void.—*Id.*
3. The abandonment of a homestead does not make valid a past mortgage of the same void *ab initio*.—*Id.*
4. A homestead (under the state statute) can be had in lands belonging to the United States; the nature of the claimant's title is not a matter that concerns a creditor.—*Waterson v. E. L. Bonner Co.*, 554.
5. All the improvements upon the land, including fences, belong to the homestead and cannot be taken by a creditor.—*Id.*
6. A mortgage of a homestead, which is not signed by the wife, is void.—*Id.*

MUNICIPAL CORPORATIONS.

See CONSTITUTION, 1, 2, 3—Records of, see MANDAMUS, 3.

1. The laws of Montana provide that "The corporate authority of cities shall be vested in a mayor and in a board of aldermen to be denominated the city council, and in such other officers as are herein mentioned or authorized to be elected or appointed by the city council or mayor." (Compiled Statutes 1887, Division 5, Chapter 22, Laws 1893, page 190). Also, that in case of a tie in any vote or proceeding of the city council,

- the mayor shall have the casting vote (Laws 1888, pages 126-127); also, that "it shall require a majority vote of all the members constituting the council to confirm city officers." *Held*, that the mayor is a constituent part of the council, and that, where there is a tie vote of the aldermen on the confirmation of an officer, he has the right to vote for confirmation.—*State ex rel. Young v. Yates*, 289.
2. The city council was composed of the mayor and eight aldermen; all were present when the roll was called for confirmation; four aldermen voted in favor of confirming, the others did not vote and the mayor then voted for confirmation. *Held*, that the officer was legally confirmed.—*Id.*
 3. Compiled Statutes 1887, section 345, forbidding a mayor to be interested directly or indirectly in the profits of any city contract entered into while he is in office, does not apply to a mayor who was not interested in a contract made with the city, but who agreed, after the contract was accepted and filed with the proper official, to take stock in a corporation succeeding to the rights of the original contractors.—*State ex rel. v. The Great Falls Water Works*, 518.
 4. Where contractors with a city for a water supply did not file their acceptance within the time prescribed by the ordinance, but the city, without objecting, allowed them to erect the works and supply water for several years according to contract, it waived any defect in acceptance.—*Id.*
 5. A city granted an exclusive right to supply water for a term of 15 years, at fixed hydrant rates. The grantees erected waterworks, issued and sold bonds, and supplied the city with water according to contract for 7 years, when the city repudiated that part of the contract fixing rates, and insisted on a continued supply at lower rates. *Held*, on mandamus by the grantees to compel the levy of a tax to pay contract rates overdue, that the city could not be heard to say that the contract was void because the grant was exclusive, or for an unreasonable length of time at fixed rates, or unwise on the part of the city.—*Id.*
 6. Laws 1889, page 185, section 16, amending Compiled Statutes, section 415, so as to provide that the amount of taxes to be levied in any one year in any city or town for water purposes shall not exceed one-half of 1 per centum, etc., became part of an ordinance contract for a water supply, made and accepted while it was in force, so that the contractors had a right to insist that, so far as necessary to pay rentals due them according to contract, a special tax should be levied annually, not to exceed the specified limit.—*Id.*
 7. In view of laws 1889, page 185, section 16, amending Compiled Statutes section 415, so as to provide that the amount of taxes to be levied by a municipality for water purposes shall not exceed a certain per cent., etc., and thereby making liabilities of municipal corporations for water rentals under contracts with water companies payable out of a special fund, such liabilities are not debts, within the constitutional limitation.—*Id.*
 8. An agreement of a city in a contract with a water company to pay to the company's bond holders the money due or to become due from hydrant rentals, or as much as necessary to pay interest on the bonds, and the signing on behalf of the city of a certificate to that effect on the back of the bonds, is not a loan of credit by the city, in violation of act of congress 1888, section 2 (Compiled Statutes of Montana, page 32.)

NEGLIGENCE.

See DAMAGES—EVIDENCE—INSTRUCTIONS—MASTER AND SERVANT.

NEGOTIABLE PAPER.

See INSTRUCTIONS--PLEADINGS.

1. Where the holder of a note secured by a mortgage on a homestead, seeks to recover thereon he is entitled to a judgment for the amount due upon the note, although the mortgage is void.—*American Savings and Loan Association v. Burghardt*, 323.
2. Mere delay in presenting a note or in collecting it, does not constitute a defense as to an accommodation maker.—*Heffertin v. Krieger*, 123.
3. The endorsee of negotiable paper, who takes the same before maturity as collateral

security for a pre-existing debt of the payee, is to the extent of his claim a purchaser in good faith and is not affected by equities between the parties of which he had no notice.—*Yellowstone Bank v. Gagnon*, 402.

4. Where, however, the debt is less than the amount named in the collateral note, the pledgee is protected against equities between the original parties, only to the extent of the debt for which the collateral was given.—*Id.*
5. In action against the maker of a check brought by endorsee, the burden is upon the plaintiff to prove good faith, according to the rule laid down in *Rossiter v. Loeber*, 18 Mont. 372.—*Harrington v. Butte & Boston Mining Co.*, 411.

NEW TRIALS.

See EVIDENCE, 2, 6, 14, 18, 20, 25, 27.

1. Where the notice of intention to move for a new trial does not specify "the insufficiency of the evidence," etc., as one of the grounds of the motion, the verdict cannot be disturbed upon that ground.—*Mulligan v. Montana Union Railway Co.*, 185.
2. Where the evidence is conflicting, an order denying a motion for a new trial will be affirmed.—*Beckstead v. Montana Union Railway Co.*, 147.

For other cases on this point, see APPEALS.

NON-SUIT.

See PRACTICE (Civil), 1.

NOTICE OF APPEAL.

See APPEALS, 3.

OFFICERS.

Confirmation of, see MUNICIPAL CORPORATIONS.

ORDER.

See APPEALS, 1, 23, 30—Record on appeal from, APPEALS, 23, 31.

PARENT AND CHILD.

See HABEAS CORPUS.

PARTIES.

1. In an action for debt on an injunction bond all of the obligees are necessary parties to the action, the bond being as to them joint and not several.—*Montana Mining Co. v. St. Louis Mining & Milling Co.*, 313.
2. The fact that some of the obligees had no interest in the subject of the suit in which the injunction was granted, does not change the rule.—*Id.*

PARTNERSHIP.

1. A retiring partner is liable to firm creditors, although in the agreement of dissolution the remaining partner assumes all firm indebtedness and retains all firm assets.—*National Cash Register Co. v. Brown*, 200.
2. The liability of the retiring partner to creditors is that of a principal and not that of a surety.—*Id.*
3. The fact that the firm creditor releases an attachment on property belonging to the remaining partner who is insolvent, constitutes no defense in an action against the retiring partner, although the release was made against his protest and with knowledge of the insolvency.—*Id.*

PLEADING.

PARTITION.

Fees in, see ATTORNEY AND CLIENT.

PAYMENTS.

See CONTRACTS.

PERSONAL PROPERTY.

SALES OF PERSONAL PROPERTY—PLEDGE.

PLACER MINES.

See MINING CLAIMS.

PLACE OF TRIAL.

See VENUE.

PLEADING.

See HUSBAND AND WIFE—IN CRIMINAL CASES, See PRACTICE (Criminal.)

1. Verification is not necessary to vest jurisdiction, and therefore where one of the defendants in a lien foreclosure relied upon a judgment lien as prior to the plaintiff's lien it was error to exclude the judgment roll in the action wherein he recovered the judgment merely because the complaint was not verified.—*Johnson v. Puritan Mining Co.*, 30.
2. Plaintiff brought suit to collect of the defendants, trustees of the Bozeman Light Co., an account claimed to be due from that company to the Thompson-Houston Electric Co., and to have been assigned to plaintiff on November 20th, 1889. The answer denied the assignment of the account to plaintiff, alleged that the account was assigned to a corporation other than plaintiff on the 24th day of March, 1890, and alleged payment to have been made to that corporation prior to the commencement of the suit; the replication denied all of the allegations in the answer. Verdict for the defendant. *Held*, that the only material issue in the case was whether or not the account had been assigned as alleged in the answer; and that an instruction confining the inquiry of the jury to that issue was correct.—*General Electric Co. v. Black*, 110.
3. Plaintiff sued in trespass for damages to real property; the defendant pleaded an agreement of plaintiff to convey to defendant a portion of the property, and a release and discharge as follows: that plaintiff agreed to "release all damages heretofore caused — (on the premises) by any act — of defendant — as well as all damages that might thereafter be occasioned to any part of the property on account of the defendant's use of the part conveyed." Among others the following denials were contained in the replication, "plaintiff denies that under and by virtue of said contract — or any other contract, he agreed to and did release defendant from damages caused by the acts complained of" and "plaintiff admits that defendant paid — for the land conveyed and the ordinary incidental damages to the adjacent land, but not the damages for the trespass complained of in the complaint." *Held*, that an issue as to settlement and discharge was raised.—*Sweeney v. Montana Central Ry. Co.*, 163.
4. Joseph Smith was committed by a justice of the peace of Carbon county on a charge of grand larceny, and held to appear at the district court, the bond was fixed at the sum of \$1,000, and the defendants were the sureties thereon. The condition of the bond was, "if the said Joseph Smith shall be — at the next term of said court, on the first day thereof — and not depart therefrom without the order of the said court, and if convicted of said crime, will render himself in execution thereof, then the obligation to be void, otherwise to be in full force and effect." Smith failed to appear upon being duly called; *Held*, that in an action against the sureties, the complaint does not have to state the manner of committing the crime of grand larceny, it being sufficient, in

that respect, if it appear from the complaint that an information was filed in the said court charging Smith with the crime of grand larceny; *Held* also that the complaint need not allege that Smith made default without excuse.—*State v. Wrote*, 208.

5. An allegation that "Smith was called and failed to appear in the district court" is equivalent to an averment that his default for not appearing was entered of record. (§268 Criminal Practice Act).—*Id.*
6. It appearing from the complaint that the information was for grand larceny, it does not need to appear that the crime charged in the information was the same crime for which he was held to answer.—*Id.*
7. It is not necessary to state in the complaint that the bond was "certified by the sheriff to the clerk of court, and by him filed and recorded."—*Id.*
8. Under section 745, Code of Civil Procedure 1895, it is not necessary to state in a complaint by an administrator the facts showing jurisdiction of the court to grant letters; it is sufficient to state that letters were duly given and made; the better practice, however, is to state the facts.—*Knight v. Le Beau*, 223.
9. That the plaintiff has no legal capacity to sue, is a separate ground of demurrer, distinct from the grounds of "facts insufficient to constitute a cause of action" and from the ground of "uncertainty," and cannot be considered unless specified in the demurrer.—*Id.*
10. Unless it appears upon the face of the complaint that the court has no jurisdiction of the subject matter, a demurrer will not be sustained on that ground.—*Id.*
11. A complaint in an action by an administrator is not subject to a demurrer on the ground that it is unintelligible and uncertain because it does not state the date of the death of deceased.—*Id.*
12. In an action to quiet title, plaintiff must allege and prove possession of the premises.—*Sklower v. Abbott*, 229.
13. In an action upon an injunction bond, it is not necessary to allege a demand upon, and a refusal to pay by the principal.—*Montana Mining Co. v. St. Louis Mining & Milling Co.*, 313.
14. A complaint which properly alleges the execution and delivery of a promissory note, a default in payment, the giving of a mortgage to secure the same and the breach of the condition upon which foreclosure of the mortgage may be had, does not state two separate causes of action; the money judgment and the decree are different modes of relief for the same wrong.—*American Savings & Loan Association v. Burghardt*, 323.
15. In such an action the plaintiff is entitled to a judgment on the note, although the mortgage given to secure the same is void.—*Id.*
16. An answer which merely denies "each and every allegation of the complaint not herein specifically admitted," does not deny the allegations of fraudulent intent set forth in a complaint in an action to set aside a conveyance on the ground of fraud.—*National Wall Paper Co. v. McPherson*, 355.
17. Affirmative allegations in the answer may have the same effect as specific denials of the allegations of the complaint, and in such case plaintiff's motion for judgment on the pleadings is properly denied.—*Id.*
- N. B. This case was decided under former code of practice.
18. In an action to compel a corporation to transfer and issue to plaintiff a certificate of stock, the complaint alleged that a certificate of stock had been issued to "C" and by him transferred to "S" who transferred the same to plaintiff. The answer, among other allegations, stated that while the stock appeared on the company books in the name of "C" an attachment issued in an action in which "S" was defendant was levied upon all of the interests of "S" in the stock of the company standing in the name of "C," and that at the time of such levy "S" was the assignee of the stock; no replication was filed. *Held*, that defendant was entitled to a judgment on the pleadings.—*Matusovitz v. Telegraph Co.*, 368.
- N. B.—This action was under the former code of practice.
19. In an action upon an account stated, it is not necessary to allege a promise to pay.—*Vought v. Brooks*, 374.
20. A replication which denies that plaintiff's claim was assigned to defendant for collection "as alleged in the answer," admits that it was assigned for collection.—*Ma-honey v. Butte Hardware Co.*, 377.

21. A complaint and a replication which are contradictory will not support a judgment.—*Id.*
22. Where, however, in such a case plaintiff, without objection, is allowed to make his pleadings consistent, a judgment will not be reversed.—*Id.*
23. A party is not bound by admission in a pleading which he has abandoned or amended.—*Id.*
24. Where an accommodation maker is sued, and he claims that there has been a misapplication of the money, he must show by his answer definitely that there has been such misuse and that he has been injured thereby.—*Hefferlin v. Krieger*, 122.
25. It is not necessary to allege in the complaint that the check was bought in good faith by the endorsee.—*Harrington v. B. & B. M. Co.*, 411.
26. Where the answer alleges that the check was fraudulently procured by the endorsee, the issue is formed by sufficient denials in the replication.—*Id.*
27. A complaint in an action to foreclose a mechanic's lien upon several pieces of property not contiguous and not of similar character, which does not show that the material for which the lien is sought was furnished under one contract, or for which part of the property it was furnished, does not state facts sufficient to constitute a cause of action, and is uncertain and unintelligible, because it does not sufficiently designate the property for which the material was furnished.—*Big Blackfoot M. Co. v. Blue Bird M. Co.*, 454.
28. In an action in the nature of trespass to try title to a mining claim, it is not necessary for plaintiff to deraign title; a cause of action is stated when the complaint alleges ownership of the plaintiff and ouster.—*McKay v. McDougal*, 438.
29. A different rule prevails in action brought, after filing of an adverse claim, to determine the right of the litigants to a United States patent to the mining claim in dispute.—*Id.*
30. The court suggests the proper practice for pleading separate causes of action in the same complaint.—*Id.*
31. An answer which assumes that the complaint contains an allegation, supplies the omission.—*Lynch v. Beechel*, 548.
32. The complaint alleged that the plaintiff was the owner of all the waters of a stream; the answer denied the appropriation, and also alleged that plaintiff until 1879 (subsequent to defendants' appropriation) had no use for any greater quantity of water than 50 inches and that his appropriation in excess of that amount was void. *Held*, that the allegation in the answer was not affirmative matter and that no replication was necessary.—*Arnold v. Pasavant*, 575.

PLEDGE.

See NEGOTIABLE INSTRUMENTS.

1. A pledgee of personal property who holds it as a security for the performance of a contract by the pledgor and who sells it for its full value without notice to him, and applies it in payment of the damages ascertained to be due for such non-performance, is not liable to the pledgor for the full value of the pledge.—*Reardon v. Patterson*, 231.
2. Before the pledgor can sue for the conversion, he must show that he was entitled to the possession, either by proving performance of the contract for which it was pledged as security, or payment of the damages for non-performance.—*Id.*

POLICE REGULATIONS.

See CONSTITUTION, 8.

POSSESSION.

In action to quiet title, see PLEADINGS, 12.

PRACTICE (CIVIL)

Answer after demurrer overruled, see APPEALS, 22, 29—and INFRA, 6.

1. On a motion for a non-suit, all evidence tending to prove plaintiff's case will be assumed to be true.—*State ex rel. Harmon v. Conrow*, 104.

2. The practice of incumbering a record with immaterial matter and numerous assignments of error which are not relied upon, is commented upon by the court.—*General Electric Co. v. Black*, 110.
3. The object of rules of court is to facilitate the dispatch of business; they cannot be invoked to bar a right unless a failure to comply with them is clear.—*Pabst Brewing Co. v. Montana Brewing Co.*, 294.
4. Affidavits may be filed contradicting the matters set forth to excuse a default in an swearing.—*Bulte Butchering Co. v. Clarke*, 306.
5. Held, on the facts presented by the record, that the order refusing to set aside the default would be sustained.—*Id.*
6. Where defendant answers after a demurrer is overruled, he waives any objection to the complaint because of any ambiguity or uncertainty therein.—*Lynch v. Bechtel*, 548.

PRACTICE (CRIMINAL.)

APPEALS, 1, 4—INSTRUCTIONS, 13, 14.

1. The pleas of former acquittal and once in jeopardy involve issues of fact under section 1990 of the Penal Code and, therefore, cannot be determined without a finding by a jury.—*State v. O'Brien*, 6.
2. Section 2171 of the Penal Code, which requires that a notice of at least two days shall be given to the county attorney of the presentation of a bill of exceptions to the judge for settlement, is mandatory; and the record must show affirmatively that the law has been complied with.—*State v. Gawth*, 48.
3. Under laws 15th Session, page 75, the essence of the crime is the keeping of a place where a game (mentioned in the statute) is dealt or played for money without a license; and where the keeping of such a place for such purpose without a license is sufficiently charged, the information is not demurrable because it also alleges that defendants kept the place as employees of some one else.—*State v. Gray*, 206.
4. Whether or not the game charged in the indictment is one for which no license can be issued under the Hunt law (above cited) is a question of fact for the jury.—*Id.*
5. A verdict of guilty of assault and battery in the second degree, is justified where it appears from the record that a witness named Edwards testified that, at the time and place mentioned in the information, he saw defendant, with a whip in his hand, dragging upon the ground in an unconscious condition, one Plum, the person upon whom the assault is alleged to have been committed,—that witness asked the defendant what the trouble was, that defendant answered, "he called me a son of a bitch, and I hit him, I won't take that from anybody," that witness then said "I guess you have fixed him. I guess you won't have to take it off old Dick any more,"—and defendant replied, "I did not hit him very hard. He will be all right in a little while"—although another witness testified that he was with defendant at the time, did not see a whip in his hand, and did not see him drag Plum. Plum testified that he was struck from behind and was rendered unconscious, so he did not know who struck the blow.—*State v. Broadbent*, 467.
6. It is not necessary to allege, in an information for an assault and battery in the second degree as defined in subdivision 3, section 401 of the Penal Code, that "the assault was committed with the intent to inflict grievous bodily harm;" because the statute does not include the word "intent" in defining the crime.—*Id.*
7. A motion in arrest of judgment on the grounds that defendant was not arraigned, and that no copy of the information with indorsement thereon including names of witnesses was ever delivered to him, is properly denied, when the record shows that defendant was personally present in court, and was arraigned and counsel appointed for him, and that he waived time allowed by statute, and thereupon entered his plea of "not guilty."—*Id.*
8. It is not necessary to plead, in an information charging a public offense, that leave of court was had to file the same,—and it is not necessary to verify the information,—if an examination was had before a magistrate. A demurrer to an information on the grounds above stated is properly overruled.—*State v. Mansfield*, 483.
9. When the defendant in a criminal case objects to the information because leave of

court was not had to file the same, or because an examination was not had before the same was filed on a complaint under oath, a motion to quash supported by affidavits, and not a demurrer, is the proper practice,—the presumption being that these preliminary steps were properly taken, if nothing to the contrary affirmatively appears. — *State v. Mansfield*, 483.

PRESUMPTIONS.

See APPEALS, 14, 15, 30—EVIDENCE—Of continuance of ownership, see EVIDENCE, 10—Of death, see EXECUTORS AND ADMINISTRATORS—JUDGMENTS—PRACTICE (Criminal.)

PRIVILEGED COMMUNICATIONS.

See ATTORNEY AND CLIENT.

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS.

PUBLIC ADMINISTRATOR.

See EXECUTORS AND ADMINISTRATORS.

PUBLIC LANDS.

See MORTGAGES.

PUBLIC OFFICERS.

See MUNICIPAL CORPORATIONS—ELECTIONS.

PUBLIC POLICY.

SALES OF PERSONAL PROPERTY—MUNICIPAL CORPORATIONS.

PUBLIC ROADS.

1. The owners of land along and through which a public road runs are not entitled to damages on vacation of the road by the proper authorities.—*State ex rel. v. Board of Commissioners*, 582.
2. By the vacation of a public road there is no taking of private property for public use, within the meaning of Const. Art. 3, § 14.—*Id.*

QUESTION OF FACT.

See PRACTICE (Criminal.)

QUESTION OF LAW.

See CONTRACTS.

QUITCLAIM DEED.

See DOWER.

QUO WARRANTO.

See ELECTIONS—REMEDIES.

RAILROADS.

See CONSTITUTION, for fence law and ticket brokers,

RECORD ON APPEAL.

See APPEALS, 13, 23, 24, 29, 31.

REHEARING.

See APPEALS, 7.

REMEDIES.

1. Where the same legislature gives two remedies for the enforcement of a right, effect should be given to each statute.—*State ex rel. Brooks v. Fransham*, 273.
2. Accordingly, *held*, that in this state a person claiming to have been elected to an office, may bring a proceeding under Section 2010 in the nature of *quo warranto*, although Section 1414 same code gives another remedy for a trial of the same issue.—*Id.*

RES ADJUDICATA.

The decision of this court on a former appeal that a bond which was in suit for reformation was valid without reformation when properly construed, was necessarily an adjudication as to the validity of the bond and is therefore the law of the case on a second trial to recover the amount due on the bond.—(*Watson v. O'Neil*, 14 Montana 197.) *Priest v. Eide* 53.

REVENUE.

See CONSTITUTION 8.

RIGHT OF WAY.

See EMINENT DOMAIN.

RULES.

Of Corporations, see INSTRUCTIONS 2—Of Courts, see PRACTICE (CIVIL)—APPEALS 26.

ROADS.

See PUBLIC ROADS.

SALES OF PERSONAL PROPERTY.

1. A contract for the sale of merchandise which requires the vendor to ship the goods free on board the cars, on or before a certain date, is complied with by the vendor when he places the goods on board the car at the designated point on that date; and there is no implied obligation on his part to see that the carrier moves the car forward toward its destination before the expiration of the day named.—*Clark v. Lindsay & Co.*, 1.
2. Plaintiff sold "L" certain chattels; the terms of the sale provided that title should remain in the vendor until the purchase price was paid; plaintiff afterwards took a chattel mortgage on the property from "L," which he foreclosed; plaintiff was the purchaser at the sale; he then turned the property over to "L" under the original agreement; *held*, that plaintiff was not estopped to deny "L" title, in an action to recover the property which had been seized by a creditor of "L."—*Goodkind v. Gilham*, 385.
3. Where the sale of goods by a county commissioner to the county, is declared to be void under a statute, the title of the goods remains in the vendor; he may sell them, and his vendee may resell them to the county and recover the reasonable value thereof.—*Moree v. Coms. Granite Co.*, 480.

SERVICE.

Of Notice of Appeal, see APPEALS 3—Of Summons by Publication, see JUDGMENTS 4 and MECHANICS LIENS—Of Execution on Indian Reservations, see EXECUTIONS.

SHERIFF.

Deeds of, See DOWER—Fees of, see FORECLOSURE—EXECUTIONS.

Under an execution against the property of "L," a sheriff sold personal property in her possession, but belonging to a third person, and which had been attached in the action; after the sale the sheriff learned that "L" did not own the property, and he then returned the money to the purchaser and the property to its owner, and made his return upon the execution in accordance with the facts. *Held*, that the sheriff was not liable to the judgment creditor for the amount realized at the sale.—*McCarthy v. O'Marr*, 215.

SHIPMENT.

See Sales of PERSONAL PROPERTY.

SPECIFICATIONS.

See APPEALS, 2.

STATUTE OF LIMITATIONS.

1. An action by a widow for an assignment of dower and to recover rents and profits is not within the general statutes of limitations of the Code of Civil Procedure of 1887. (*Burt v. C. W. Cook Sheep Co.*, 10 Montana 571, *Affirmed*.)—*Lynde, Adm., v. Wakefield*, 23.
2. Under Compiled Statutes, 1887, an action on a judgment must be commenced within six years, save when the time is extended by section 53, Code of Civil Procedure.—*Whiteside v. Catching*, 294.
3. The Statute of Limitation does not cease to run on account of the death of the judgment debtor, except that the time between his death and the granting of letters of administration is not counted as part of the six years.—*Id.*

STATUTES.

See SUMMONS—For Statutes of Montana Construed, see this vol. immediately following Table of Cases Cited.

STOCK.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 4—CORPORATIONS—PLEADINGS.

SUB-CONTRACTOR.

See MECHANICS' LIENS.

SUMMONS.

See SERVICE.

1. Statutes prescribing the manner of service of summons are mandatory and must be strictly pursued, and, therefore, a statute providing for service of summons by reading it to the defendant personally, or by leaving a copy at his place of residence, is not satisfied by the delivery of a copy to the defendant personally, and a judgment rendered upon such service is void.—*Sanford v. Edwards*, 55.
2. In an action in the district court on a judgment recovered in a justice court, parol evidence is inadmissible to show that the service of the summons in the justice court was made in conformity with the statute, for the purpose of authorizing a judgment in the district court.—*Id.*

SURETIES.

See PLEADINGS.

TAXES.

See MANDAMUS.

1. Under section 3752, Political Code, no reduction in assessments of property can be made unless the party assessed makes and files with the Board of Equalization a written application therefor, verified, and showing the facts upon which the claim for reduction is based.—*Barrett v. Shannon, Treasurer*, 397.
2. In an action brought to recover money paid for taxes claimed to be unlawfully assessed, the complaint must show that plaintiff filed the written application above referred to.—*Id.*

TRESPASS.

See PLEADINGS—EVIDENCE.

Where it appears from the evidence that the defendant entered upon land and cut and removed hay therefrom under an agreement with plaintiff that he might do so, a verdict against the defendant for trespass should be set aside.—*Meyers v. Savery*, 329.

TIME.

See CONTRACTS, 2.

TITLE.

Action to quiet, see PLEADINGS, 12—In trespass, see PLEADINGS, 28—Of laws, see CONSTITUTION, 9.

TRUSTS AND TRUSTEES.

See CORPORATIONS, 2, 6.

1. "A," the holder of a first mortgage, and "B," the holder of a second mortgage on real estate, entered into an agreement whereby the mortgages were cancelled and a new note and mortgage were given to "B" for the entire indebtedness, and "B" gave his note to "A" for the amount due him, secured by the new note and mortgage as collateral; thereafter an agreement was made by the terms of which the mortgage and note to "B" were returned and cancelled, the real estate was conveyed to "B," who agreed that the property should remain as security for "B's" debt to "A," and if he could not borrow the money on a note and mortgage to pay this debt, he would execute a mortgage to "A" as security therefor. Held, that upon the transfer to "B" a constructive trust was raised in behalf of "A," and that "B" held the title to the property subject to the equitable lien of "A."—*Lewis v. Lindley*, 422.
2. A wife who purchases from her husband real estate which is subject to an equitable lien, takes the property subject thereto unless she is a purchaser in good faith and without notice of the lien; and the burden is upon her to show good faith and want of notice.—*Id.*

UNDERTAKING.

See APPEALS, 11, 12.

ULTRA VIRES.

See CORPORATIONS, 10.

VALUE.

See MARKET VALUE.

VENDOR AND VENDEE.

See SALES OF PERSONAL PROPERTY.

VENUE.

1. Actions on an account should be brought in the county in which the defendants, or some of them, reside, or in the county in which plaintiff resides and in which defendants, or any of them, may be found.—*McDonnell v. Collins*, 372.
2. In such an action a motion for a change of venue should be granted, when it appears that all the defendants reside and were served with summons in a county other than that in which the action is brought.—*Id.*

VERIFICATION.

See PLEADINGS.

WAIVER.

See DEMURRER—APPEALS, 22—PRACTICE (Civil)—JUDGMENTS.

WATER COMPANIES.

See MUNICIPAL CORPORATIONS.

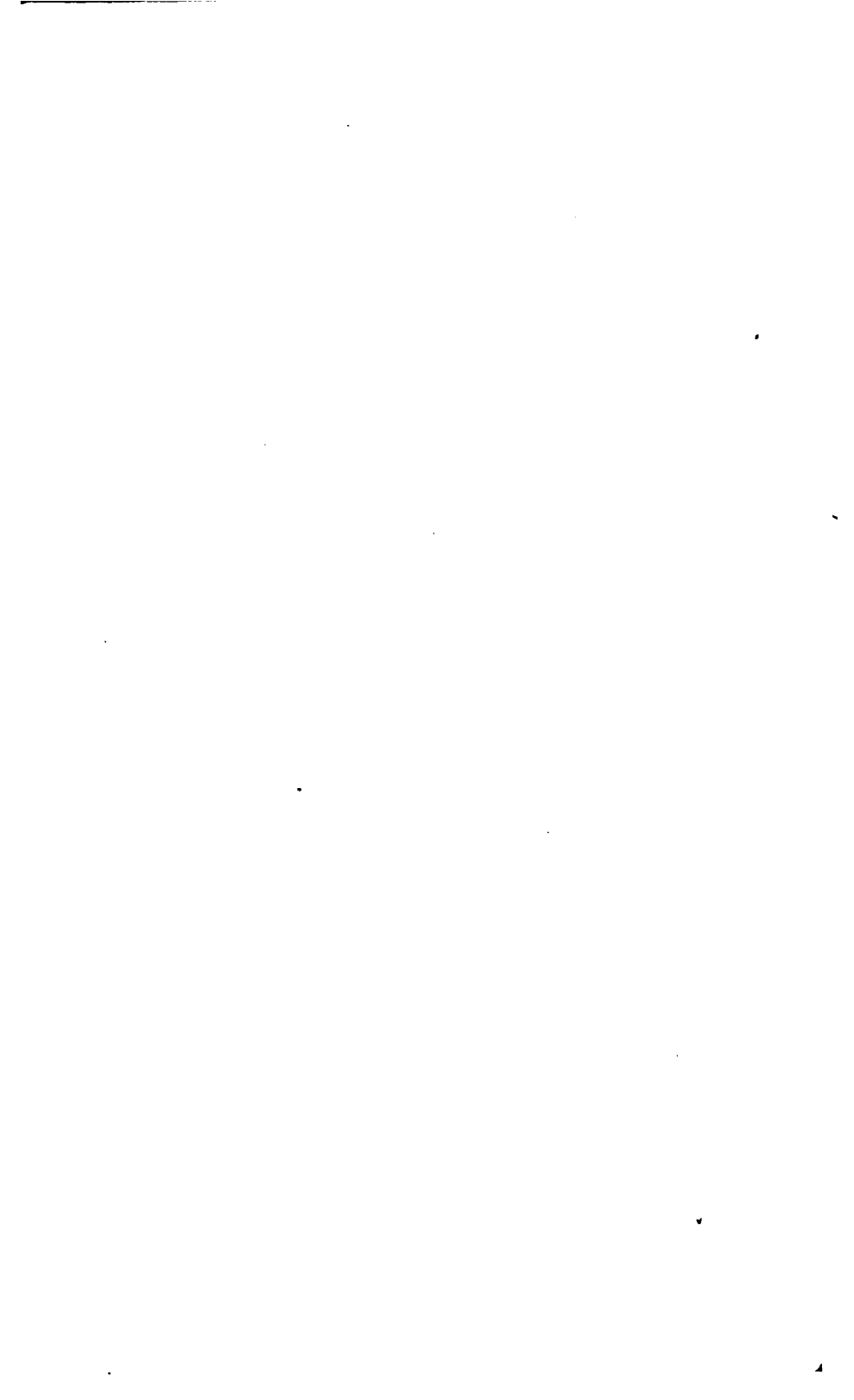
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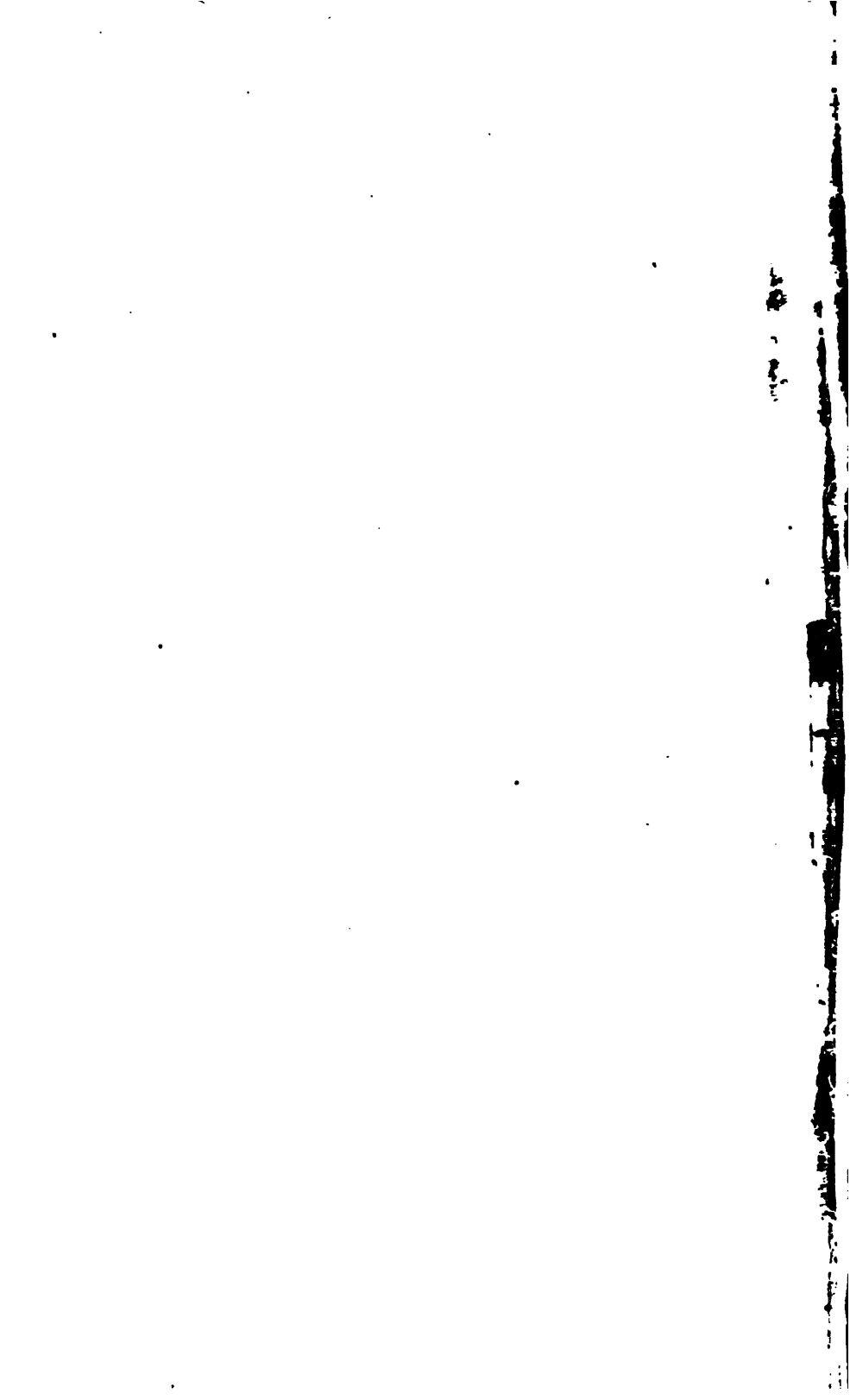
See EVIDENCE—EMINENT DOMAIN—PLEADINGS.

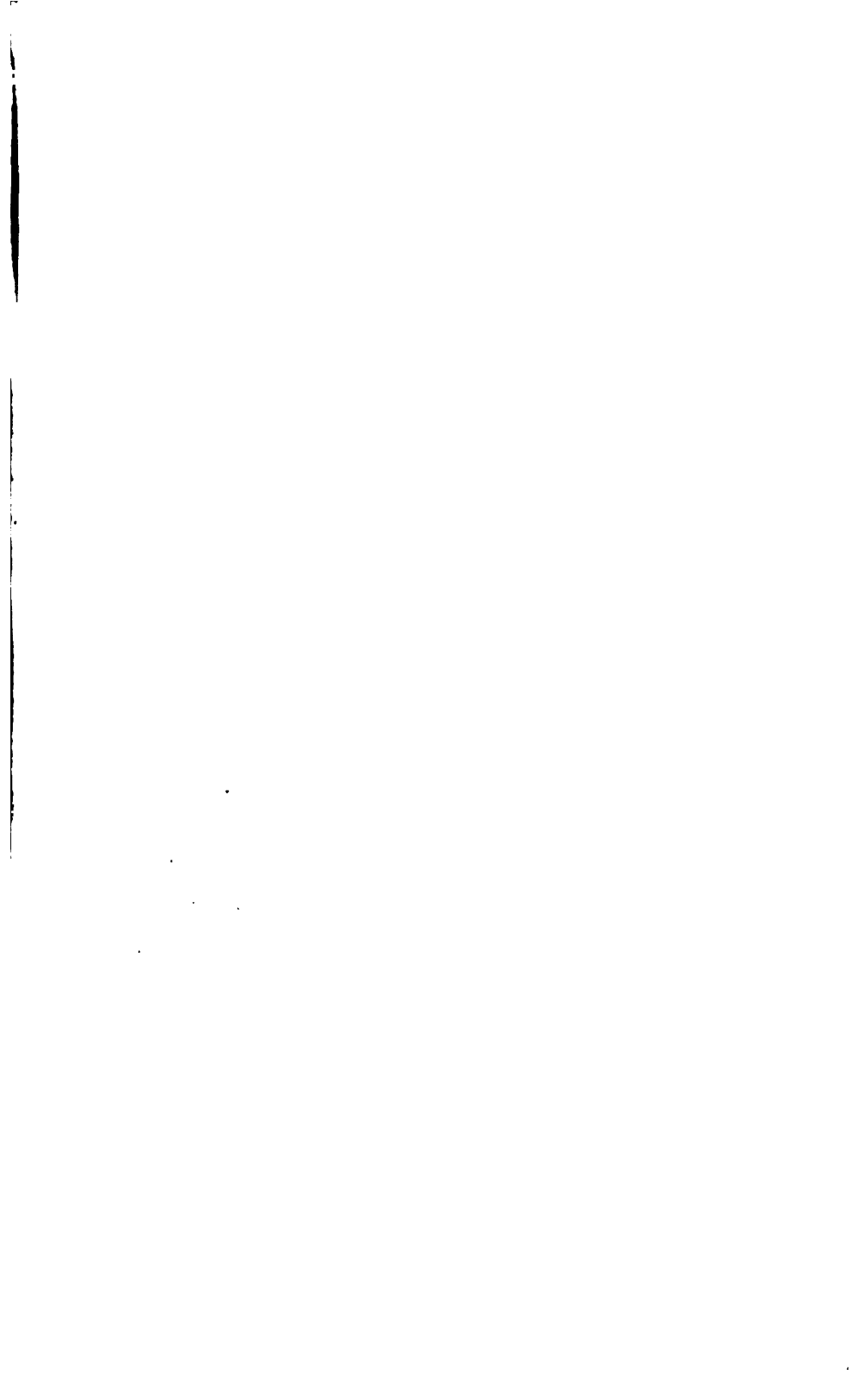
1. A conveyance of land, with the appurtenances, conveys the grantor's interest in a ditch passing through the land which had been constructed under an agreement with the owner of the water right, without proceedings in eminent domain, whereby he should be permitted to construct the ditch without payment of damages in consideration of the use by the grantor of sufficient of the water to irrigate his land below the ditch, and which was necessary to its cultivation, although such right to the use of the water was not described in express terms in the deed. (*Tucker v. Jones*, 8 Montana 225; *Sweetland v. Olsen*, 11 Montana 27, followed.)—*Sloan v. Glancy*, 70.
2. In the absence of evidence of an intention to relinquish, the mere non-user of a water right is not an abandonment. *Smith v. Hope Mining Co.*, 18 Montana 432, followed.—*Id.*
3. Where the evidence justifies the finding of the court fixing the relative priorities of the appropriations of water, appellant is not injured because the court arbitrarily fixes particular dates of the appropriations of the several parties, the date being merely incidental to the question of priority.—*McDonald v. Lannen*, 73.
4. T who owned land on both sides of a creek, constructed a ditch on the north side of the stream, by means of which he could irrigate only forty acres of land on that side, although the capacity of the ditch was greater than the amount of the water necessary for that purpose; subsequently and after other appropriations had attached, it was found to be necessary to construct another ditch to reach the land on the south side of the stream. Held, that, as to subsequent appropriators, T's appropriation was not limited to the amount necessary to irrigate the forty acres; and that T was entitled to a priority to an amount equal to the capacity of his original ditch.—*Id.*
5. In 1869 P settled on unsurveyed public lands (a squatter's right) and made an appropriation of water to be used thereon; by *mens* oral transfer, B obtained possession of the land and G traded ranches with B's widow, and subsequently filed upon it as a homestead. Held, that a squatter's right can be transferred verbally; that the water right was an appurtenant to the land; that the oral transfer did not constitute an abandonment of the water right and that consequently the date of appropriation of G's right was properly fixed as of 1869. (*Barkley v. Tieleke*, 2 Montana 59, distinguished.)—*Id.*
6. The evidence showed that plaintiff had 180 acres of land which could be covered by water from his ditches in 1869. Held, that the mere fact that for years he only cultivated 45 acres of land, does not show that he had been guilty of a lack of diligence in using the water for some beneficial purpose.—*Arnold v. Passavant*, 575.

WITNESSES.

Expert, see EVIDENCE 12.







HARVARD LAW

